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Supreme Court of the United States

OCTOBER TERM, 1967

No. 55

THOMAS EARL SIMMONS, ET AL., PETITIONERS,

vs.

UNITED STATES.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1967.

CERTIORARI GRANTED JUNE 12, 1967

SUPREME COURT OF THE UNITED STATES

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[fol. A]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

15223, 24, 25

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

WILLIAM EARL ANDREWS, THOMAS EARL SIMMONS, and
ROBERT JAMES GARRETT, Defendant-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Honorable Bernard M. Decker, District Judge.

Appendix—Filed December 8, 1966

Philip Ginsburg, 122 South Michigan Avenue, Chi-
cago, Illinois, 60603.

Doris A. Coonrod, 30 North LaSalle Street, Chicago,
Illinois, 60602.

Raymond J. Smith, 105 West Adams Street, Chi-
cago, Illinois, 60603.

[File endorsement omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

No. 64 Cr 134

INDICTMENT—Filed March 3, 1964

The March 1964 Grand Jury charges:

That on or about February 27, 1964, at Chicago, Illinois,
in the Northern District of Illinois, Eastern Division,
William Earl Andrews, Thomas Earl Simmons, and Robert

James Garrett, defendants herein, did by force, violence and intimidation, unlawfully, knowingly and wilfully take from the presence of employees of a savings and loan association, to wit, the Ben Franklin Savings and Loan Association, 4812 S. Pulaski Avenue, Chicago, Illinois; which said Ben Franklin Savings and Loan Association was then and there a savings and loan association, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation under Certificate No. 3642, a sum of money, to wit, approximately One Thousand Five Hundred and Eighty-One Dollars (\$1,581.00), which money was then and there in the care, custody, control, management and possession of the aforesaid Ben Franklin Savings and Loan; in violation of Section 2113, Tit 12 18, United States Code.

Count Two

The March 1964 Grand Jury further charges:

That in committing the offense hereinbefore described, the said defendants,

[fol. 2] William Earl Andrews, Thomas Earl Simmons, and Robert James Garrett, defendants herein, did put in jeopardy the lives of employees of the aforesaid Ben Franklin Savings and Loan Association by the use of dangerous weapons, to wit, firearms, all in violation of Section 2113, Title 18, United States Code.

A True Bill:

William Andrews Petition for Severance.

Robert James Garrett's Motion for return of seized property.

Amended motion for return for seized property filed.

Transcript of Proceedings—February 16, 1965

MARY RUTH REY called as a witness on behalf of the government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 5129 South Halsted, and I am the sister of defendant William Earl Andrews.

(Whereupon the witness identified William Earl Andrews in open Court.)

I know the defendant, Thomas Earl Simmons, and he [fol. 3] is my brother-in-law.

(Whereupon the witness identified Thomas Earl Simmons.)

Both Simmons and Andrews lived in Pulaski, Tennessee, during the year 1964. My mother, Mary Ellen Mahon, lives at 848 West 51st. Place with my stepfather and my grandfather.

On February 27, 1964, I was in the hospital in Chicago, I own a 1960 Thunderbird, and it has a scrape on the lower right hand panel of the passenger side.

(Whereupon the witness identified government's exhibits 1-A and 1-B as pictures of the car showing the scrape.)

I usually park the car at 5129 South Halsted, about a half block from my residence. My brother, the defendant Andrews, called me at the hospital on February 27, 1964, and asked to borrow my 1960 Thunderbird.

HELEN SCAPARDINE called as a witness on behalf of the government testified as follows:

Direct examination.

By Mr. Dunne:

I am a housewife, and I reside at 11816 South Peoria. On February 27, 1964, I was working at the Tower Lake News Agency.

I know Mary Ruth Rey. I arrived at work on February 27, 1964, at about 11:30 or quarter to twelve, and received a telephone call from Mary Ruth Rey. After the call, William Earl Andrews came into the news agency and we had a conversation.

[fol. 4] (Whereupon the witness identified William Earl Andrews in open court.)

Andrews told me that Mary Ruth Rey told him he could borrow the car, and I gave him the keys. Mary Ruth Rey owns a 1960 White Thunderbird with a long scratch on the side of it.

(Whereupon the witness identified government's exhibits 1-A and 1-B as pictures of that car.)

I was using the car while she was in the hospital. I saw Andrews again later that same day about two or 3:30 p.m. when he came into the news agency and returned the keys.

Cross examination.

By Mr. Smith:

My employer in the Tower Lake News Agency is Joseph Franz. Franz has occasion to drive Mary Ruth Rey's Thunderbird, but he was not using it during the period of February, 1964. Franz also has a 1959 or 1960 white Rambler. I was substituting for Mary Ruth Rey while she was in the hospital.

"By Mr. Smith:"

"Q. Were you present later in the day of February 27, 1964, at that office, that Tower News Agency?"

"A. Yes."

"Q. At any time did the police arrive at Tower News Agency?"

"A. Yes."

"Q. Was Joseph Franz questioned concerning the car?"

"A. He was."

"Q. Was he taken into custody?"

"Mr. Dunne: Objection, your Honor."

[fol. 5] "The Court: I will sustain your objection."

.

By Mr. Smith:

"Q. Do you know who Joseph Franz was questioned by?"

"Mr. Dunne: Objection."

"The Court: I will sustain this entire line of objections."

.

Cross examination.

By Miss Coonrod:

When Andrews came to pick up the car, it was parked in front of the news agency.

I did not see where the car was parked after Andrews returned it until the FBI men came to the news agency. Earl Andrews did not tell me where he had parked the car.

The FBI took a statement from me.

The last time I saw it was when Mr. Dunne came to my house on February 3. At that time Mr. Dunne and I talked about the testimony I would give in this trial. Mr. Dunne allowed me to read the statement I had previously given to the FBI.

There was one set of keys for the Thunderbird. I had been using the car for a couple of days while Mary Ruth Rey was in the hospital.

.

PHILLIP EDWARD MAZAIKA called as a witness on behalf of the Government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 5959 West 127th. Street, Palos Heights, and I am employed at Commonwealth Edison's Will county Station.

[fol. 6] On February 27, 1964, I was working at Ben Franklin Savings and Loan Association, 4812 South Pulaski, as a part-time teller. At about 1:45 that afternoon, I was typing behind one of the teller's windows.

I had my back to the window. I heard the buzzer to let people come in and I heard a man say, "I want a money order."

"Q. Was there anything unusual about the voice?"

"A. Well, I—"

"Mr. Smith: I object to something unusual about his voice."

"The Court: Objection overruled."

By the Witness:

"A. I noticed he had a southern accent."

By Mr. Dunne:

"Q. What did you do after you heard the voice with the southern accent say, 'I want a money order'?"

"A. I mentioned to the girl that was working next to me that he wants a money order and he gave it in a southern accent and—"

"Miss Coonrod: Your Honor, I object to all of this conversation."

"The Court: I will sustain the objection as to the conversation."

"Mr. Dunne: Your Honor, I ask you reserve your ruling subject to it being connected up."

"The Court: This is a conversation that—"

"Mr. Dunne: I ask that you reserve it for two more questions."

[fol. 7] "The Court: All right.

• • • • •
The man had a gun in his hand and it was cocked.

(Whereupon the witness identified the man with the cocked gun as Thomas Earl Simmons.)

As they were leaving I noticed that another man had been waiting in the corner of the bank. I could not positively identify that other man. I waited a few seconds after they left the bank.

I ran north on Pulaski. I recognized one of the men in the passenger side of a car. It was the same man that had the gun. The one I identified as Thomas Earl Simmons.

"Q. What kind of a car was he riding in?"

"A. I guess it would be about a 1960 Thunderbird, white, two-door."

I could not recognize the driver of the car. I could not tell if there was anybody in the back seat. The Thunderbird was dirty and had a big scrape along the passenger side on the door. I was unable to get the license number of the car.

(Whereupon the witness identified Government's exhibits 1-A and 1-B as pictures of the car.)

I got back to the bank about two o'clock. Later I talked to agents of the FBI and officers of the Chicago Police Department.

Cross examination.

By Mr. Smith:

When I ran out of the bank, the car was to my left; that is, if I turned and faced the same way the car was going it would have been on my left.

I was closer to the passenger side. I was present in court this morning with agents of the F.B.I. Two of the [fol. 8] defendants were present at that time. I had never been to the Federal Building before this morning.

I never observed the defendants at any other court hearing or proceeding. On the day of the robbery, I stayed at the bank after quitting time until about 6 or 6:30. The agents interviewed me concerning the robbery. I was shown snapshots, but I cannot remember if it was the day of the robbery or the next day.

The F.B.I. agents came to the bank to show us the snapshots. We viewed the pictures in the lobby at the front of the bank. Others at the bank looked at the pictures before me. We were not together when we looked at the pictures.

Of the five or six snapshots which they showed me, one of them was larger. The others measured about four by six inches. I spent two and a half years in Fort Benning, Georgia, in the Army. Four employees were in the front of the bank when I heard someone say, "I want a traveler's check."

There were no customers present, but there were more employees in the rear room of the bank. To get inside the bank, a person has to push the button at the outside door, and we press a buzzer which opens the door electrically.

There is no guard in the bank. There are several rooms in the bank, the main front room, a middle room and a backroom downstairs as well as a couple of rooms upstairs. It was about 1:30 or two o'clock when I heard the man ask for the traveler's check. I did not push the buzzer to let him in; I don't know who did. It was a nice sunny day, and I don't know if the lights were on or not. There was plenty of light.

I was facing the windows and there was some sunlight [fol. 9] coming in from the windows. The teller area has a counter with four windows; it is about four or five feet high. The counter itself is about four feet high with partitions between the windows about five feet high. The partitions are fairly solid.

I am five feet eight inches tall. When the man first came in, I was seated with my back to the customer area. There were no other customers in the customer area.

The other man was in the corner and I didn't hear him say anything. He was to my right in the corner. The first man was to the man in the corner's right, about two windows over. Both were equally distant from the door. They were six to ten feet away from each other. When the second man was near the window, my view of him was blocked.

I didn't look at him because I was looking at the gun right in front of me. Florence Babick, another teller was working at the teller window next to me. She is able to push the buzzer to let people in. The man with the gun was about twenty feet from the door.

There is a fairly clear view of the door from the place where the button is pushed to open the door. I was never asked by the Police or by the FBI to view a lineup of possible suspects. I saw the six snapshots once. I made one statement to a man from the F.B.I., whose name I don't know. That statement was made half an hour or maybe 45 minutes after the incident happened.

We were all talking about what happened just after the incident. Most of the people had not seen what had happened because they had been upstairs or in the back. I probably told some of the other employees what I had [fol. 10] seen. I told nobody about the southern accent except the girl I talked to at the moment they came into the bank. I have known during my life fifteen or twenty people from Tennessee.

"Q. After hearing a man say the words that you said that were said in the bank, that a man has a Tennessee accent, are you able to determine that?"

"Mr. Dunne: Objection, your Honor. He said he had a southern accent. There are lots of states down south besides their home state."

"Miss Coonrod: Your Honor, I object to the statements of the United States Attorney."

"Mr. Smith: Your Honor—"

"Mr. Ginsberg: I object, your Honor."

"The Court: Now, just a moment here. Let's do this one at a time." "Mr. Smith"

"Mr. Smith: Your Honor, in his statement—"

"The Court: Never mind what is in his statement."

"Mr. Smith: Well, I would like to ask the question—"

• • • • •
"The Court: You may proceed."

• • • • •
"Miss Coonrod: Your Honor, will you rule on my objection."

"The Court: What was your objection?"

"Miss Coonrod: My objection is to the United States Attorney's continuous reference to these defendants when it is unnecessary. For example, when he said, Judge, now, the remark about Tennessee being their home state. I feel this is unnecessary and ask it be stricken."

[fol. 11] "The Court: Well, any reference to the—Tennessee being the home state of the defendants will be stricken."

"Mr. Dunne: Judge, I would object in light of the testimony of Mrs. Mary Ruth Rey that they resided in Pulaski, Tennessee."

(Whereupon Mr. Smith asked the witness the difference between a Georgia accent and a Tennessee accent.)

"By the Witness:"

"A. Well, I don't really know if I could give you any specific terms to make the difference, but I spent two and a half years in Georgia, Alabama, Carolina. I thought I could distinguish the little bit of difference that there is."

"By Mr. Smith:"

"Q. All right. Could you tell us how a man from Tennessee says, 'I want a money order'?"

"Mr. Dunne: Objection, your Honor. I will object further unless he lets him relate the whole conversation about, 'I will kill her, I will shoot her dead if she moves.'"

"Miss Coonrod: Your Honor, I—"

"Mr. Finsberg: Objection."

"The Court: Now, just a moment. I will sustain the objection to the last remark made by counsel for the prosecution. The witness may answer the question."

The people of Tennessee speak faster than others.
It is a different kind of talk all together.

(Mr. Ginsburg filed his amended motion for the return of seized property and for the suppression of evidence.)

[fol. 12] PHILIP EDWARD MAZAIKA resumed the witness stand and testified further as follows:

Cross examination.

By Mr. Smith:

I am twenty two years old. I was twenty-one at the time of the robbery.

I viewed five or six snapshots of men. A couple of the pictures were with one man, and some were with other men, but I am not sure.

There were two pictures of the man I identified as being the man with the gun. They were both snapshots. There might have been just one: I cannot remember.

(Whereupon Mr. Smith requested that he be furnished with the pictures that the F.B.I. had shown to this witness. The government had no objection.

(The Court was advised that the pictures would be sent for.)

Cross examination proceeded.

I did not really see the man in the corner until they started to leave the bank. I did give a statement to the F.B.I.

I did not tell the FBI in the statement that I saw both of the men at that time. I did say in my statement that I saw two men at that time, but I didn't see them.

I further told the FBI that the other man got the money from Bea. I did not see that either.

I saw the man running with something in his hand and I assumed it was money. Later that day I saw a 1964 Thunderbird.

[fol. 13] The main difference between a 1959 and a 1960 Thunderbird is in the tail lights, I think. Off hand I cannot tell the difference between a 1960 and a 1961 Thunderbird, but the one I saw was a 1960. I cannot right off hand tell you the difference between a 1960 and a 1962, but I would be able to tell which was the newer model if I saw both together. But the one I saw on the 27th was definitely dirty.

I was maybe a half block away when I saw the car on 27th of February, or maybe it was about 100, 125 feet. I estimated the distance when I made the statement to the FBI.

(Objections by the United States Attorney and ruling.)

The bank is at 4812 Pulaski and the next block is 4900. It seems like an hour, but I guess it was about five or ten minutes from the time I saw the man with the gun in the bank until the time the two men left. I was standing next to Florence Babick, right in front of the man with the gun, during this entire time.

I was not able to see the second man until I moved as they started to leave. I saw the car for approximately five or ten seconds. It was exceptionally dirty all over.

(Mr. Smith again requested the pictures and the request was denied by the judge.)

Cross examination.

By Mr. Ginsberg:

There were three other tellers up front with me at the time of the incident, and there were others at the rear of the bank. The three tellers were Bea Parliaman, Florence Babich and Mary Bialek.

[fol. 14] I quit working at the bank about a month after the incident.

JOSEPH FRANZ, testified on behalf of the government as follows:

Direct examination.

By Mr. Dunne:

I live at 5129 South Halsted, and I am a circulation manager for the American.

My office is also located at 5129 South Halsted. I have been working in newspaper circulation for about seven years.

I knew a woman named Mary Ruth Rey during February, 1964. She owned a 1960 Thunderbird. I rode in the car during February, 1964.

The car was damaged from an accident on the right door and the right rear fender.

(Whereupon the witness identified government's exhibits 1-A and 1-B as pictures of the car.)

The scratch was on the car in February, 1964. On February 27, 1964, I got to the office about a little after twelve.

When I arrived at the office I saw Helen Scapardine.

I had a conversation with Helen Scapardine when I entered the office. Before I entered the office I noticed that

Mary Ruth Rey's car, the one previously described, was not in the street. After the conversation with Helen Sca-[fol. 15] pardine, I went to lunch and returned a little after one. At about two or 2:30 p.m., two police officers came in and asked me who owned the Thunderbird that was parked across the street. Shortly before that Mary Ruth Rey's brother returned the keys to the car. I had a short conversation with the police.

(Whereupon the witness identified William Earl Andrews as the brother of Mary Ruth Rey.)

I called Ruth Rey and had a conversation. I then placed another call, this time to Pat Jones. Pat Jones is Ruth Rey's sister and lives with her mother, Mary Mahon, at 848 West 51st. Place. I had a conversation with Pat Jones and then I took a ride and picked up Tommy Simmons from Ruth's mother's house at 848 West 51st. Place. I cut through the alley to get to the house.

(Whereupon the witness identified Thomas Earl Simmons in open Court.) We went for a cup of coffee at Sam's Drive-In on 51st. and we had a conversation.

I asked Tom Simmons if he knew why the police were checking on Ruth's car. He said he didn't know. I went to get some coffee, and Tom went across the street to a tavern, presumably to make a phone call. He came back after making the call and said he wanted me to stop back at Ruth's mother's house to pick up his bag and coat.

I told him that I had to pick up my son from school first, which we did, and then I dropped my son off at the office. I dropped Tommy off at Halsted and 55th. I went to Mrs. Mahon's home and Ruth's mother was there. Pat Jones was also there.

She showed me where Tommy's bag and coat were. After [fol. 16] picking up the bag and coat I went back to Halsted and 55th. and picked up Tom. He told me that he was going to leave town and asked me to tell Pat to keep her mouth shut. After that I went back to my office.

.

Cross examination.

By Mr. Smith:

Later on the afternoon of February 27, 1964, I was interrogated by the Federal Bureau of Investigation. They asked me for my whereabouts during the period of 1:30 and two o'clock on that date. I was questioned for about six hours.

I was taken to the station but never charged. I have driven the white Thunderbird, but I cannot remember exactly when. I own a white Rambler. I was interrogated by the F.B.I. from three to nine.

I told Simmons that the police had been investigating about the car.

Cross examination.

By Mr. Ginsberg:

I do not know Robert Garrett.

Cross examination.

By Miss Coonrod:

I have known Simmons about a year.

ARLETTE LUCILLE DE LUC, called as a witness on behalf of the government testified as follows:

I live at 3832 West 77th Street, Chicago, Illinois. As vice-president of Ben Franklin Savings and Loan Association I keep under my care custody and control the Federal Savings and Loan Association Insurance Certificate. That certificate is in full force and effect.

(Whereupon the witness identified government exhibit 2 for identification as that certificate.)

FLORENCE BABICK, called as a witness on behalf of the government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 5616 South Karlov Street, Chicago, Illinois. In February, 1964, I was employed as a teller at Ben Franklin Savings and Loan, 4812 South Pulaski.

I was working at the bank on February 27, 1964, when around 2 p.m. two men came into the bank and went to one of the teller windows. When I went to the window to wait on one of the men, he put a gun through the window.

He said "Stay right there or I will shoot you."

(Whereupon the witness identified the defendant Thomas Earl Simmons in open court.)

He told the others in the bank not to set off the alarm. I am unable to identify the other man.

The man, who told me to stand tight where I was, had a definite southern accent or drawl. Everything that I have testified to took place in the City of Chicago, Northern District of Illinois.

Cross examination.

By Mr. Smith:

I came up on the elevator with three other ladies and Mr. Dunne to the 21st. floor. Mr. Dunne did not tell me at that time "There is one of the guys."

I did not see the man that I just identified in the hallway after leaving the elevator. The only man I saw in the bank [fol. 18] was the man who had the gun. I told the FBI in a

statement that I asked the taller of the two men who came into the bank if I could help him.

.

I could not see the second man because of the flowers and the raised partition. I did not see Mr. Mazaika but I knew he was behind me.

Although I cannot describe the second man, there were two men who came into the bank. I knew that the second man was there, but I could not see his face.

.

I was shown lots of pictures after February 27, 1964. There were both snapshots and other kinds.

There were at least two or three pictures of the man I have identified as Simmons.

"Q. No, what I am asking you is this: Except for Simmons, the one, the pictures of the man that you identified as Simmons, did any of these other individuals depicted in the pictures have more than one picture of them?"

"A. Well, there could have been."

"Q. You do not know?"

"A. Offhand, I don't, no, but I am sure that there could have been.

"Q. Were there some individual pictures only one picture of other individual?"

"A. Yes, there were."

"Mr. Smith: Your Honor, just for the record, I request those pictures again. I know that your Honor has overruled, yes.

[fol. 19] "The Court: Yes, you may request them again."

"Mr. Smith: Pursuant to 3500."

"The Court: That is right."

"Miss Coonrod: If your Honor please, I would like to join in Mr. Smith's request, the request made by Mr. Smith both as to these pictures and as to the prior pictures."

"The Court: I will assume that you are all joining in on these requests. Motion denied."

I never viewed a lineup of men on this case. I was present at two other robberies of Ben Franklin Savings and Loan. When I came here this morning I sat in the back of the courtroom. I saw Simmons in the courtroom at that time.

Three other ladies were with me at that time.

In the moments after the robbery was over, I may have discussed what happened with other employees of the bank. I may have talked it over with Mr. Mazaika and another girl at the window.

* * * * *

I cannot recall anyone other than Mr. Mazaika and the two tellers that I talked to concerning the robbery. On the day of the robbery I stayed at the bank until about five, an hour later than usual. I did not see anyone else being shown the pictures.

The men were in the bank about five minutes.

When the men left the bank they ran north. The three snapshots I saw of Simmons were at different angles, but I cannot remember if any of them were larger than snapshots. I read the statement I gave to the FBI this [fol. 20] I also read it when Mr. Dunne gave me the summons to appear here at the trial.

Between the time of the robbery and the time I saw him here this morning I did not see Simmons at all.

Cross examination.

By Miss Coonrod:

I don't remember seeing the men leave the bank building.

I saw the men run past the front window of the bank. I did not see Mr. Mazaika go out of the bank after them, although I could have from where I was.

I saw him re-enter the bank, but I don't remember how much later that was.

* * * * *

(Whereupon the government offered into evidence the two pictures of the 1960 white Thunderbird, and they were received.)

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MARY BIALEK, called as a witness for the government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 4622 South Mozart and have been a teller at Ben Franklin Savings and Loan, 4812 South Pulaski, for two and a half years.

At about 2 p.m. on February, 1964 (sic) two men buzzed at the door of the bank and I let them in. They asked for a money order and another teller, Bea Parliaman went to one window and I went to another window.

One of the men went to the third window where he pointed a gun at Florence Babick and told all of us not to move or push the buzzer or he would shoot her.

[fol. 21] (Whereupon the witness identified Thomas Earl Simmons as the man with the gun.) One of the auditors who were in the bank at that time moved up in front and he told the man not to move or he would shoot Florence.

Another examiner got up in the middle of the room and the man motioned the gun away from Florence. I then hit the buzzer alarm on the floor. Soon after that the man with the gun saw that the other one had already gotten the money and they both went out. The man collecting the money was short and dark.

(Whereupon the witness identified Robert James Garret in open court.)

As they were walking toward the door I noticed that they had covered the money with a blue cloth.

Where upon a discussion was had out of the presence and hearing of the jury.

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(A hearing was had out of the presence of the jury on the motion to suppress evidence on behalf of Robert James Garrett and the following testimony was taken.)

ROBERT JAMES GARRETT, called in his own behalf testified as follows:

Direct examination.

By Mr. Ginsberg:

A suitcase belonging to me was removed from the home of Mrs. Mary Mahon on the evening of February 27, 1964.

I can't be sure if government's group exhibit 4 for identification is the same suitcase because I only had it a week, but I could tell by the clothes inside.

(Whereupon the witness identified the clothes inside government group exhibit 4 for identification as his.)

Government's group exhibit 3 for identification is not my suitcase.

Cross examination.

By Mr. Dunne:

I am a defendant in this case.

On the morning of February 27, 1964, I took the suitcase to the home of Mrs. Andrews at around 51st and Halsted.

Redirect.

By Mr. Ginsberg:

I did not consent to the removal of my suitcase from the basement.

MARY ELLEN MAHON, called as a witness, testified as follows:

Direct examination.

By Mr. Ginsberg:

I am 55 years old and I was formerly married to Frank Andrews. I now live at 848 West 51st Place.

I returned to my home from work at about 3:30 p.m. After I arrived home six men, whom I do not know, searched my home.

They did not tell me who they were and they did not show me any warrant. They searched both upstairs and downstairs in the basement.

They left when I asked them to, but two more guys came back at about 6:30 p.m. These two showed me a card at the door, but I couldn't tell what it was.

Three of the original six who searched the house had [fol. 23] guns in their hands.

The two men who came later did not have a warrant.

They were in the basement about three minutes and opened up the suitcases.

I asked them please not to take the suitcase but they took it with them. They also tore up the house and looked and searched everything.

Cross examination.

By Mr. Dunne:

I never saw anybody bring either of the suitcases to my home. I don't know how they got there, and I didn't give anybody permission to put them in the house.

I never saw any of the defendants, including my son and my son-in-law in my home on February 27, 1964.

.

I went with the two people when they went to the basement and took the suitcases. I can't be sure if those are the same suitcases. .

"—if they were FBI agents,—contacted you at about 6:30 at night, didn't you consent to a search of your home?"

"A. Well, I didn't know what to do. I never had my home searched before."

"Q. Well, did they ask you if they could search your home?"

"A. They just said that they—they just said that there was something in the basement that they wanted, but I didn't know that the suitcase was down there; and so they went down, and I followed."

I wouldn't recognize the two men if I saw them again. I didn't give anybody permission to put either of the suit- [fol. 24] cases in my home on February 27, 1964. I did not see Andrews in my home that day.

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DANIEL R. HUNTINGTON, called as a witness, testified as follows:

Direct examination.

By Mr. Finsberg:

I am a special agent of the F.B.I. On February 27, 1964, at about 5:15 p.m., I went to the home of Mrs. Mahon along with the agent Quinlan. We took government's exhibit No. 4, for identification from her house after opening it while inside the house. I do not recall Mrs. Mahon telling us not to take it. We did not have a search warrant.

.

Cross examination.

By Mr. Dunn:

I participated in the investigation of the Ben Franklin Savings and Loan, 4812 South Pulaski. I located a white Thunderbird and was told that it had been lent to Earl Andrews, whose mother lived a half block from where it was parked.

We went to Mrs. Mahon's home and knocked on the door. She let us in and we sat down with her, her husband, and his father and told them of the robbery and the possibility that Earl Andrews might have been involved in it. Mrs. Mahon told us she did not have a picture of him.

Mrs. Mahon consented to the search and we advised her of her rights when we first arrived.

She took us to the basement and at that time we opened and examined government's exhibits 3 and 4 for identification. She said that she didn't know whose suitcases they [fol. 25] were, but that she didn't mind if we opened them up. We examined the contents and told her that the money wrappers and coin cards inside indicated the suitcase came from whoever committed the crime. She said she guessed that that was right and she said we could take them, that they didn't belong to her. We took them from the home.

Redirect examination.

By Mr. Ginsberg:

It was only about a minute between the time the automobile was found that we went to the house.

We had no idea there was a suitcase there at the time.

"Mr. Ginsberg: The six men who Mrs. Mahon testified to first, are any of those men here?"

"Mr. Dunne: I don't know of any six men, Mr. Ginsberg. There may have been police there, but they took nothing, according to her testimony."

"Let the record show again that Mr. Ginsberg is conferring with Mr. Smith."

"The Court: Counsel, there is no purpose in—certainly co-counsel—I mean, they are not co-counsel, they represent different defendants, but they are certainly entitled to confer with each other. The record does not have to show that, as long as they do it inaudibly.

I would suggest that you do yours inaudibly, too, over here."

"Mr. Dunne: Yes, sir. But there is no other counsel at my table."

"The Court: The acoustics in this courtroom are almost too good."

[fol. 26] Arguments on motion to suppress evidence.

"The Court: In my opinion, the petitioner has not produced sufficient evidence to justify my holding that this search or seizure of this property was in any way illegal, and the motion is denied.

(Whereupon the following proceedings were had herein, in open court, in the presence and the hearing of the jury.)

• • • • •

MARY BIALEK, called as a witness for the government testified as follows:

Direct examination resumed.

By Mr. Dunne:

When the man I identified as Garrett left the bank, he was carrying a blue cloth.

"Mr. Smith: I object to any reference to this blue cloth."

"The Court: The objection is overruled."

(Whereupon the witness identified government's exhibit 4F for identification as the same blue cloth.)

Cross examination.

By Mr. Smith:

Today I read over the statement which I gave to the FBI the day of the robbery. Mr. Dunne was present. Miss Dziedzie, an auditor at Ben Franklin, was also there.

The defendants whom I named on the witness stand were present in the courtroom when I arrived in the courtroom this morning with three other ladies.

I viewed snapshots and full-length pictures a few times after the robbery.

[fol. 27] I am not sure if there were three pictures of one man. I identified Simmons from some pictures I saw yesterday.

There was more than one picture of him. I discussed the case with the FBI several times, and they took down statements the day of the robbery and the day I identified the pictures.

I discussed the hold up with several other workers at the bank, including Miss Babick but not Mr. Mazaika. The first time I saw the snapshots, there must have been fifty or more.

I am not sure if anyone other than Simmons was depicted in more than one picture. The men were in the bank for about five minutes.

They had a line-up in the other robbery investigations but not in this one. They came several more times with the pictures to make sure we identified the right man. They brought pictures of Simmons each time, but I don't remember if they were the same ones I saw the first time.

.

There were pictures of Garrett.

Mr. Mazaika went out of the association almost immediately after the holdup men.

He had to go through a door to the teller's cage to go after them.

I buzzed them into the bank. When they were outside the door I did not see anything suspicious about them.

I didn't see any weapons or the blue cloth. I haven't seen the man I have identified as Simmons since February 27, 1964. I haven't seen the picture at all since last year. [fol. 28] I don't know how they were dressed.

(Whereupon Mr. Smith requested the pictures used by the FBI to show this witness and the court ruled against the production of said pictures.)

Cross examination.

By Mr. Ginsberg:

When I talked to the FBI, I told them I did not get a good look at the Number 2 man.

The number 2 man said he wanted a money order when he came in, but I don't think he spoke in a manner that was unusual to me.

I did not see them full face as they were leaving.

Cross examination.

By Miss Coonrod:

I never saw any employee of the bank hand any money to the men.

And I never at any time saw any more than two men in the bank.

"Mr. Smith: I am going to ask that all witnesses who are in here, and who have testified, be excluded."

"Mr. Dunne: Your Honor, I am going to object to this. This is not the Star Chamber."

"Miss Coonrod: Your Honor, I object to any reference to Star Chamber in this record. This is a public trial. We are seeking justice."

"The Court: Just a moment. We will have no further comments. The use of the words "Star Chamber" is unnecessary, entirely. The witnesses who have testified, if they [fol. 29] are not going to testify further, may remain in the courtroom.

If they are going to testify further, they should be excluded. But they are certainly entitled to stay here if they are not going to testify further."

BERNICE PARLIAMAN, called as a witness by the government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 3724 West 63rd Place, and I was teller at Ben Franklin Savings and Loan on February 27, 1964.

At about 2:00 p.m. two men came into the bank, and one of them asked if he could buy a money order. Then I saw that one of them had a gun leveled at me as he approached my teller window. He said, "Sack it, or stack it." He gave me a small blue sack, and I began filling it with cash from the drawer.

Whereupon the witness identified Simmons as the man who said "sack it, or stack it."

One of the other tellers hadn't seen the gun and asked the second man if the two were together. Then the first man moved toward the other teller, and the second one, I imagine, moved up and held a gun on me. The second man was shorter than the first.

(Whereupon the witness identified Garrett as the second man.) The second man told me to hurry up and I pushed the bag back over to him. About \$1200 was in the drawer at the time. It was audited after the robbery.

I know that I had a group of \$10.00 bills and a pack of five hundred. I had not opened that at all.

[fol. 30] I also had rolled coin and little folder with quarters and dimes in them.

(Whereupon the witness identified government's exhibit 4C for identification as money folders and coin wrappers similar to the ones she had in her drawer.)

* * * * *

"Q. I show you what has previously been marked as government's exhibit 4-F for identification, and I ask you if this is the same blue bag—the same, or similar to the, blue bag that was used to get the money?"

"A. It is similar, but it is not the one."

"Q. All right."

"Mr. Smith: I move that all testimony about this bag be stricken. She says, "Similar, but not the one."

"Miss Coonrod: I join in the motion."

"Mr. Dunne: It is a question of fact, Your Honor, for the jurors."

"The Court: Didn't somebody else testify with reference to this?"

"Mr. Dunne: Mrs. Bialek testified that that is the bag that she observed."

"The Court: No, the other witness."

"Mr. Dunne: The other witness, Mrs. Babick."

"The Court: (Continuing) No., the other witness did not qualify her statement, as I recall."

"Mr. Dunne: Mrs. Babick.

Mrs. Bialek, I think, did not qualify her statement."

"The Court: No. The objection is overruled. Motion denied."

[fol. 31] Cross examination.

By Mr. Smith:

I told the FBI that the gun looked like a water pistol. I also told them that that blue bag was not the same one.

He said "Stack it" very softly. He had the gun out the moment I came up to the window. Mrs. Babick was at her window when she asked the second man if they were together.

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Mrs. Babick was not in a good position to see the first man. When she asked her question, the second man also had a gun in his hand.

I was shown photographs after the robbery. I identified one of the snapshots as being of Simmons, the snapshot that resembled him the most.

There were other pictures of him. I viewed the pictures again about a week later.

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I saw the pictures again when I was subpoenaed to testify. They came out to my house and showed me pictures.

The day after the robbery they showed me at least three or four pictures of Simmons. There were more than one picture of other men, but I'm not sure if Garrett was one of these.

They showed me two or three pictures of Andrews at that time.

I was present at other robberies of the Ben Franklin Savings and Loan. In those investigations we were given a lineup to pick out the men.

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[fol. 32] Cross examination.

By Mr. Ginsberg:

Both men spoke in the same way.

The whole occurrence took approximately three to seven minutes.

I don't remember if the second man's gun was bigger or smaller than the first. I described him to the FBI as smaller, darker, with a heavier beard—entirely different from the other.

.

Three or four weeks after the robbery, two men showed me about twenty pictures.

One of them was of Garrett. I was also shown pictures of Garrett last week. There may have been other occasions as well.

The closest employee to the witness was Florence Babick and she was approximately twenty feet away when the bag was being filled.

• • • • •

Redirect examination.

By Mr. Dunne:

When rolled coins came into the bank I wrote the account number on the back of the cards or on the rolls.

(Whereupon the witness examined government's exhibit 4-b-1 and identified the handwriting thereon as her own.)

Recross examination.

By Mr. Ginsberg:

I started wearing glasses about five years ago. I'm not sure if I was wearing them on the day of the occurrence.

• • • • •

(Counsel for the defendant Simmons, joined by other defense counsel made a motion for mistrial based on the [fol. 33] fact that the witness, Parliaman, testified that the blue bag was not the bag used in the robbery and that she had told the government that it was not before giving testimony.)

(Whereupon the United States Attorney read to the court from a statement given by the witness describing the bag as smaller than a pillow case.)

The Court denied the motions.

BERNADINE DZIEDZIC, called as a witness for the government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 3626 South Seely Avenue, and I am the comptroller at Ben Franklin Savings and Loan, 4812 South Pulaski road.

At about 2:00 p.m., February 27, 1964, I was in the back room of the bank at my desk. I heard a harsh male voice say, "Don't move. I will kill her. I will shoot her." Through a two-way mirror above my desk I observed a tall slender man holding a gun.

(Whereupon the witness identified defendant Simmons. It appeared that the identification was of Andrews and the witness after several questions went to the table and picked out Simmons.)

I turned to tell the head teller to push the alarm and then after I turned back to the window, I saw a man running north on Pulaski.

* * * * *

I saw him through the two-way mirror and the big window at the front of the bank.

[fol. 34] (Whereupon the witness identified defendant Garrett as the man she saw running outside the bank.)

Earlier in the afternoon the head teller had given Bea Parliaman \$1050, consisting of a \$500-band of \$20 and a \$500-band of \$10 and a \$50-band of singles. Immediately after the robbery I counted Miss Parliaman's cash box and found a discrepancy of \$1581. In the ordinary course of business the bank takes in wrappers of coins for deposit in accounts or for exchange into currency.

I identify the numbers which appear on the papers in government's exhibit 4-B as savings account numbers in our Association.

I identify numbers on these papers as being the account numbers of certain depositors in our association.

Cross examination.

By Mr. Smith:

When I was first asked to identify the tall thin man, I did not point to the man you are standing next to.

Nothing was told to me prior to taking the stand about the significance of one of the men being in a brown suit. I am near-sighted.

(The witness admitted that there were several discrepancies in her descriptions. She denied telling the F.B.I. some of the information which appeared in her statement.)

I was shown pictures of men a day after the robbery and about three or four weeks later. There were about five or six pictures. Two or three of the pictures were of Simmons. I don't remember seeing any picture of Andrews. [fol. 35] Mr. Dunne came to the bank and showed me pictures about a week and a half prior to trial. There were about four pictures. One or two were of Simmons and none were of Garrett.

During the week after the robbery I discussed the robbery with the other bank employees.

Cross examination.

By Mr. Ginsberg:

The robbery took about four or five minutes. I did not see Mr. Garrett in the bank. It is about twenty feet from where I sat to the street window of the bank. From my position Mr. Garrett appeared short and he did not have a crew cut.

"Mr. Dunne: The way it is now. I see."

"The Court: Counsel, I am going to caution you. I am talking now to the Assistant District Attorney, against making audible comments at the table. They should not be made. As I said yesterday, the acoustics in this courtroom are too good, sometimes. So, please refrain from making comments that can be heard from the jury or by anybody."

I saw one man leave the door, but saw two men passing in front of the window running from the bank. The man I saw leaving the bank was about six feet tall, slender with light hair.

I was shown pictures of Garrett about three or four weeks after the robbery. That is the only time I saw pictures of Garrett. I never saw him in a lineup. I heard one voice and described it as a harsh male voice.

(Whereupon proceedings were had out of the presence of the jury relative to the proposed introduction by the government of testimony of the defendant Garrett, made [fol. 36] at the hearing on the motion to suppress the evidence. The prosecutor argued that Mr. Garrett made admissions of ownership of a suitcase and clothing. Mr. Ginsberg, attorney for Garrett, objected. Mr. Smith and Miss Coonrod objected on behalf of the other defendants. The judge allowed the production of this evidence through the official court reporter.)

ROBERT J. BETZ, called as a witness on behalf of the government testified as follows:

My name is Robert J. Betz and I am Official Court Reporter to Judge Bernard M. Decker. I was present in court on February 17, 1965, and made a stenotype recording of the testimony of Robert J. Garrett. I prepared a transcript of the testimony and it is the same as government's exhibit 7 for identification. The following questions were asked and answers given.

"Q. Would you give the Court your name please."

"A. Robert J. Garrett."

"Q. To your knowledge, was a suitcase of yours removed from the home of Mrs. Mary Mahon on the evening of February 7, 1965?"

(Mr. Dunne corrected the date to February 27, 1964.)

"A. Yes."

"Q. And that suitcase belonged to you?"

"A. Yes, it did?"

"Q. Do you recognize the suitcase?"

"A. I recognize the suitcase."

"Q. Is this your suitcase?"

"A. I couldn't say I am positive, but the clothes in it—
but by the clothes in it, I could be positive."

[fol. 37] "Q. Are these your clothes?"

"A. Yes."

"Q. The green suitcase is not yours is it?"

"A. No it is not."

"Q. Where did you take the suitcase on the morning of February 27, 1964, Mr. Garrett?"

"A. To Mrs. Andrews' house."

"Q. Where is that?"

"A. I don't know the address."

"Q. Could you give us a rough estimate or an indication, and inclination of where it is?"

"A. It is around 51st and Halsted, that is all I know."

"Q. When you took the suitcase to Mrs. Andrews' home, where if anywhere, in the home did you take the suitcase, Government's Group Exhibit 4 for identification?"

"A. To the basement."

"Q. All right. Were there any other suitcases taken to the basement at the same time?"

"A. —."

"A. At the time that I took my suitcase down there?"

"Q. Yes."

"Q. Were any other suitcases taken down there?"

"A. Yes."

"Q. All right. Who took the suitcases down to the basement at the same time?"

"Q. Is the Government's Group Exhibit 3 one of the suitcases that was taken down to the basement at the same [fol. 38] time that this blue suitcase was?"

"A. I could not say."

"Q. You could not say?"

"A. No. It has been a year. I didn't even identify the one there because I didn't know positively whether that was mine or not."

"Q. You identified the contents of that suitcase; is that right?"

"A. Yes."

"Q. And the contents of that suitcase, the clothing, et cetera, was brought to you—was brought by you to Chicago in a suitcase similar to the one, Government's Group Exhibit No. 4 for identification, is that right?"

"A. Yes."

(Whereupon the Court instructed the jury that the testimony of Mr. Betz could not be considered against William Earl Andrews and Thomas Earl Simmons.

JOHN P. QUINLAN called on behalf of the government testified as follows:

My name is John P. Quinlan and I am a special agent of the Federal Bureau of Investigation. I have been so employed for fourteen years.

On February 22, 1964, I was investigating the robbery of Ben Franklin Savings and Loan at 4812 South Pulaski Avenue. I went to the vicinity of 51st and Halsted.

About five o'clock in the afternoon Agent Huntington and I went to 848 West 51st Place, Chicago, Illinois. That address is a one family dwelling house.

I spoke to Mrs. Mary Mahon. She is the mother of William [fol. 39] and Earl Andrews and the mother-in-law of Thomas Simmons.

(Whereupon the witness identified William Andrews and Thomas Simmons in open Court.)

I identified myself to Mrs. Mahon and had a conversation with her in the home.

Present at the conversation were Mrs. Mahon's husband, his father and agent Huntington. I looked around the house.

William Andrews and Thomas Simmons were not in the house. Mrs. Mahon took me through the entire house.

In the basement I observed two suitcases. I opened the suitcases and examined the contents.

The suitcases were taken from the residence to the FBI office in Chicago. They have been in my custody until the trial. The only changes were that the paper wrappers were examined by the FBI laboratory for fingerprints. This process causes a slight discoloration.

Government's Group Exhibit No. 4 for identification is one of the two suitcases. I inventoried the contents of the suitcase.

I examined the contents and clothing in the suitcase. It is the same as it was when I examined it at the home of Mrs. Mary Mahon.

(Whereupon the witness identified government's exhibit No. 4-A a knotted lady's silk stocking found in the suitcase.)

(Whereupon the witness identified government exhibits 4-B3, 4-B2, 4-B7, and 4-C all exhibits being the various coin wrappers and money folders bearing notations and previously identified.)

[fol. 40] (Whereupon the witness identified a black leather holster taken from the suitcase.)

Such a holster is usually used to carry a short barreled snub-nosed two-inch barrel, 38 calibre revolver.

(Whereupon the witness identified a cigarette carton stamped with the words "Pulaski, Tennessee", part of government's group exhibit No. 4 for identification.)

(Whereupon the witness identified government's exhibit 4-F a piece of blue cloth found in the suitcase.)

Objection to the admission of the blue cloth was renewed by Mr. Smith and overruled.

(Whereupon the witness identified government's group exhibit No. 3 for identification as a suitcase also taken at the same time from the home of Mary Mahon.)

(Whereupon out of the presence and hearing of the jury counsel objected to the connection of the second suitcase and the objection was sustained. The testimony was stricken and the Jury was instructed to disregard it.)

On February 28, 1964, I again visited the home of Mrs. Mary Mahon.

At that time and place I had a conversation with Pat Jones, Mrs. Mahon's daughter. Together we returned to the basement and located a gray car coat.

"Mr. Dunne: Q. Was that gray car coat identified by Pat Jones as belonging to the defendant Andrews?"

"A. Yes."

"Mr. Smith: I object."

"Miss Coonrod: Your Honor, I object to that."

"The Court: Just a moment. Just make an objection [fol. 41] and I will rule on it. I will sustain it."

"Mr. Smith: I also move for a mistrial at this time."

"The Court: That motion is denied."

"Miss Coonrod: I will ask the jury be instructed to disregard it."

"The Court: I will instruct the jury to disregard the question asked by counsel."

(Whereupon Miss Jones was brought into the courtroom and identified by the witness as the person he had spoken to on February 28, 1964, at 848 West 51st Place.)

I examined the contents of the coat.

(Whereupon the witness was withdrawn so that another witness could be called.)

PATRICIA SCHUSTER, called as a witness for the government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 3029 East 79th Street. My name was previously Patricia Jones. William Earl Andrews is my brother.

Thomas Simmons is my brother-in-law. I saw agent Quinlan on February 28, 1964. We had a conversation.

We went to the basement. He took quite a few things. I think he took a coat.

"Q. Did you identify this coat as belonging to the defendant Andrews?"

"Miss Coonrod: I object."

"Mr. Smith: I join the objection."

"The Court: You may ask her if she knows who the coat [fol. 42] belonged to."

"Mr. Dunne: May I refresh her recollection, your Honor."

"The Witness: I don't know who the coat belonged to because I hadn't seen my brother for quite a while and I couldn't say—"

"Mr. Smith: Your Honor—"

"Miss Coonrod, I object."

"Mr. Smith: With regard to this, I move for a mistrial at this time."

"The Court: That motion is denied. Counsel is entitled to examine."

I think that the gray coat belongs to my brother, William.

(Whereupon Mr. Smith moved that the testimony relating to the gray car coat be stricken.)

(Whereupon the following proceedings were had out of the presence and hearing of the jury.)

JOHN P. QUINLAN, out of the presence of the jury, resumed the witness stand and testified as follows:

(Whereupon the United States Attorney made an offer of proof regarding admission of the gray car coat. Objections and arguments were had and the Court sustained the objections. The jury was instructed to disregard testimony relating to the car coat.)

Cross examination.

By Mr. Smith:

On February 28, Pat Jones gave us some snapshots. They were of Andrews and Simmons.

No fingerprints were identifiable on the tested documents.

[fol. 43] Cross examination.

By Mr. Ginsberg:

I did not have a search warrant.

FRANKLIN L. JOHNSON, called on behalf of the government testified as follows:

Direct examination.

By Mr. Dunne:

I am an FBI agent. I was on duty in March of 1964, in Memphis, Tennessee.

On March 26, 1964, I was assigned to try to locate William Earl Andrews at the home of his sister 553 North Home Street, Memphis, Tennessee. We stopped the driver of a 1956 Chrysler.

We asked the driver if he was Andrews.

(Whereupon the witness identified William Earl Andrews in open court.)

He said he was Floyd Andrews. Floyd Andrews is William Earl Andrews' brother.

Later the driver of the car said that he was William Earl Andrews.

(Whereupon, said exhibits marked Government's Exhibits 1-A, 1-B, 2, 4, 4-A, 4-B, 4-C, 4-E, 4-F, were admitted into evidence against Robert James Garrett. Exhibits 1-A and 1-B were admitted as to all defendants.)

[Government Rests.]

(Whereupon the following proceedings were had in open Court, outside the presence and hearing of the jury.)

(Whereupon motion for judgment of acquittal was made [fol. 44] by all defendants.

Motions argued and denied.

(Therefore the following proceedings were had in the presence and hearing of the jury.)

Evidence Presented on Behalf of the Defendant
Thomas Earl Simmons.

THOMAS EARL SIMMONS called in his own behalf testified as follows:

Direct examination.

By Mr. Smith:

I live at 5107 South Halsted with my wife and four children. I am 26 years old and have never been convicted of a felony.

I have been a farmer and factory helper, I was a farmer in Lincoln County, Pulaski, Tennessee.

I was in Chicago on February 27, 1964. Robert Garrett, William Andrews and myself left Pulaski, Tennessee to go to New York City.

Mr. Garrett and I were in the business of raising mink. Mr. Garrett borrowed \$16,800. from New York for the mink farm.

We had car trouble in Philadelphia, Pennsylvania. In Chicago we had a four-ton cooler freezer unit and a trailer load of nest boxes for the mink ranch.

The cooler was in Cedar Lake, Indiana. My wife was taking care of the mink while we were away.

We were on the trip three days when we headed for Chicago.

We arrived in Chicago about 10:30 a.m. on February 27, [fol. 45] 1964, in Andrews' car, a 1950 Pontiac.

When we arrived at Mary Ellen Mahon's home, Pat, my sister-in-law let us in and we talked about an hour. Then Garrett, Andrews and I went to 51st and Halsted in Andrews' car.

The 5601 Club is located at that corner. We went in for beer. Andrews left several times. We left the bar about noon.

While we were in the tavern, Andrews went to get his sister's car. His Pontiac was in the parking lot, but he was having brake trouble. Andrews had his sister's 1960 Thunderbird. I did not get into the car.

Andrews and Garrett were supposed to go to Indiana, Andrews got in the car.

I did not see Garrett get in the car. I left Garrett and went to Sam's Drive-In on 51st and Racine where I ate.

I then walked to the Blue Dot tavern, 5202 South Ashland Avenue. I arrived there about ten after one and was there an hour or so.

I went back to my mother-in-law's house alone. Pat was there. At about 2:30 of a quarter to three I arrived.

I planned to take my suitcase and go to my brother's house. The next day I planned to leave Chicago.

.

I asked Pat if Andrews and Garrett had returned from Indiana. About fifteen minutes after I asked, they arrived.

Five minutes after they arrived, Joe Franz called on the telephone. Pat talked to him.

[fol. 46] She told me that Joe Franz wanted to see me in the alley. I met him in the alley. He said, "Get in." I didn't want to get in the car.

I asked Franz what this is about and he said, "The cops is after you for a robbery.", "I got to get you out of town." He said he was told that they were going to shoot me on sight. I went to Sam's Drive-In and called Andrews and Garrett.

Franz dropped me off and went for my suitcase.

Franz had a "guy" take me to Indiana. In Hammond, Indiana, I caught a bus to Pulaski, Tennessee. The next day I was arrested by a fellow named Jack from Columbia, Tennessee.

I was never in a line up—to my knowledge. I did not rob the Ben Franklin Savings and Loan Association.

* * * * *

Cross examination.

By Mr. Ginsberg:

I am not related to Mrs. Garrett, but have known him five or six years, since he was in the service.

Cross examination.

By Mr. Dunne:

I had a suitcase and I think Garrett had a suitcase.

I don't know the color of the other suitcase or their clothes. My suitcase was upstairs. I have worked at the Premier carton Co. in Chicago.

I worked there for six years beginning June 1956. We own 20 acres in Tennessee and raise mink. The farm is in my name with my wife.

We paid \$300 for a truck and \$3,000. down on the farm. He had gotten a loan in New York.

[fol. 47] He gave me \$5,500. in cash out of that loan. I have also worked part time as a bartender in my brother's tavern.

* * * * *

I never had a chance to pick up the equipment at Cedar Lake. I did not tell the arresting agent that I was at home on February 27, 1964.

I did not state that at 4:00 or 5:00 a.m. of February 28, 1964, Bonnie and Ruth Andrews left to get parts for a water pump.

* * * * *

CHRISTINE PATRICIA SCHUSTER, called on behalf of the defendant Simmons testified as follows:

Direct examination.

By Mr. Smith:

I was at home at about 3:00 p.m. on February 27, 1964.

My brother-in-law, Tommy Simmons, came home to get his things to go to his brothers. He was alone.

Andrews and Garrett came in fifteen minutes later. Then Joe Franz called, he wanted Tommy to meet him in the alley. Tommy left. The F.B.I. took pictures from me.

Cross examination.

By Mr. Dunne:

Tommy Simmons, Earl Andrews and Bob arrived at Mrs. Mahon's house about 10:00 a.m. on February 27, 1964.

I guess they had suitcases. I work nights and I was sleeping.

* * * * *

After Simmons left, he called back and ask to speak to Bob.

(Whereupon the witness identified Robert Garrett.)

[fol. 48] I did not tell the F.B.I. that my brother left without his coat.

Later that day I saw Joe Franz at the Lamex Restaurant.

.

Before February 27, 1964, I hadn't seen my brother for several months. I did call my sister once in a while.

I had never seen Bob before. As far as the mink business, I really don't know how long they had it.

Prior to going south, Mr. Simmons owned a tavern known as the Little Black Book. He owned it with his brother.

(Whereupon the defendant, Thomas Earl Simmons rested his case in chief.)

(The parties entered into a stipulation that the birth certificate of Robert James Garrett is true and accurate.)

(Whereupon defendant Garrett's Exhibit No. 1 was offered and admitted into evidence. Defendant Garrett rests.)

(Defendant William Earl Andrews rests.)

Rebuttal Testimony on Behalf of the Government.

JAMES L. MAHON, called on behalf of the government testified as follows:

Direct examination.

By Mr. Dunne:

I am an agent of the Federal Bureau of Investigation and have been for twenty years. I participated in the investigation of the Ben Franklin Savings and Loan during February, 1964. I interviewed Mrs. Patricia Jones during the course of that investigation.

She told me that Simmons called Andrews.

[fol. 49] She also told me that after the telephone call Andrews and Garrett left the house in a hurry.

.

JOHN S. STANTON, called as a witness on behalf of the government, testified as follows:

Direct examination.

By Mr. Dunne:

I am a special agent of the F.B.I. stationed in Columbus, Tennessee. I went to the home of Thomas Earl Simmons on February 28, 1964.

(Whereupon the witness identified Thomas Earl Simmons.)

I placed him under arrest at that time.

During the interview with Simmons he stated that he definitely was in Tennessee on February 27, 1964.

Whereupon the Government Rested Its Rebuttal Evidence.

(The following proceedings were had in open Court out of the presence of the jury.)

Motions for judgment of acquittal made and denied.
Conference on instructions.

(Whereupon closing arguments were had for all parties.)

(Whereupon the court instructed the jury)

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 64 CR 134

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM EARL ANDREWS, THOMAS EARL SIMMONS, and
ROBERT JAMES GARRETT, Defendants.

Transcript of Proceedings on the Motion to Suppress—
February 16, 1965

[fol. 27] HELEN SCAPARDINE, called as a witness on behalf
of the Government, having been first duly sworn, was ex-
amined and testified as follows:

Direct examination.

By Mr. Dunne:

Q. Mrs. Scapardine, I will ask you the same question I
asked Mrs. Rey, please keep your voice up so everybody
can hear what you are testifying to. Will you do that,
please.

A. Yes.

Q. Thank you. Give me your name, please, and spell
your last name.

A. Helen Scapardine, S-c-a-p-a-r-d-i-n-e.

Q. Where do you live, Mrs. Scapardine?

A. 11816 South Peoria.

Q. What is your occupation?

A. Housewife.

Q. Now, directing your attention to Thursday, February 27, 1964, were you working?

A. Yes, I was.

Q. Where were you working?

A. At the Tower Lake News Agency.

Q. Now, do you know a woman named Mary Ruth Rey?
[fol. 28] A. Yes, I do.

Q. That is the same lady that testified here just before you?

A. Yes.

Q. Now, I direct your attention to Thursday, February 27, 1964. About what time did you get to work?

A. About 11:30, quarter to twelve.

Q. All right. Did you have occasion to receive a telephone call from Mrs. Rey?

A. Yes.

Q. After that phone call, did you have occasion to see anyone at the Tower Lake News Agency?

A. Yes, I did.

Q. Who was that?

A. William Earl Andrews.

Q. Do you see him in court today?

A. Yes.

Q. Will you point him out for the record and describe what he is wearing?

A. He is wearing a blue suit.

Q. Did you have a conversation with Andrews when he came into the News Agency?

A. Yes.

[fol. 29] Q. What did you say to him and what did he say to you?

A. He said—

Mr. Smith: Your Honor, there is a standing objection for any conversation outside of the presence of my client.

The Court: This is to be admitted as to the defendant Andrews.

Go ahead and give the conversation, what he said and what you said, in substance.

By the Witness:

A. He said that Mary Ruth Rey said that he could use the car keys.

The Court: Did you have the car keys?

The Witness: Yes.

By Mr. Dunne:

Q. Did you give him the car keys?

A. Yes, I gave them to him.

Q. Do you know of your own knowledge what kind of a car Mary Ruth Rey owned on that day, February 27, 1964?

A. Yes.

Q. What kind of a car?

A. 1960 white Thunderbird.

[fol. 30] Q. Please keep your voice up.

A. Yes.

Q. Now, was there anything unusual about the passenger door side of the automobile?

A. Yes.

Q. What was unusual about it?

A. There was a long scratch on the side of it.

Q. Now, I show you what has been previously marked Government's Exhibit 1-A for identification, and ask you to look at that picture and ask you if that is the automobile of Mary Ruth Rey?

A. Yes, it is.

Q. Did she own that on February 27, 1964?

A. Yes.

Q. And you were using it while she was in the hospital, is that right?

A. Yes.

Q. I show you a second picture, Government's Exhibit 1-B for identification and ask you if that is another picture of the same car?

A. Yes, it is.

Q. Now, later that same day, February 27, 1964, about two or 2:30 p.m., did you have occasion to again see Andrews?

[fol. 31] A. Yes, I did.

Q. Did he come into the store?

A. He came into the agency.

Q. Did you have a conversation with him?

A. Yes. He said, "Here's the car keys."

Q. Did he give you the car keys?

A. Yes.

Q. Did you see Andrews after that time?

A. No.

The Court: What time was that?

The Witness: About 2:30, quarter to three.

Mr. Dunne: No further questions.

The Court: Cross-examine.

Cross examination.

By Mr. Smith:

Q. You say you work in the Tower Lake News Agency?

A. Yes.

Q. Who is your employer there?

A. Joseph Franz.

Q. Does Joseph Franz ever have occasion to drive that car that you testified about?

A. Yes.

Q. Was he driving the car during this period?

[fol. 32] A. No.

[fol. 43] PHILLIP EDWARD MAZAIIKA, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

[fol. 52] Cross examination.

By Mr. Smith:

[fol. 53] Q. Now, were you in the courtroom this morning?

A. Yes, I was.

Q. And were you present with members of the Federal Bureau of Investigation?

A. Yes, I was.

Q. And were the defendants here at that time in the courtroom?

A. Yes, I think two of them.

Q. Was there anyone else besides the defendants and their wives seated in the back of the courtroom?

A. Sir, I don't know who you mean. There were just a few other people. I don't know if they had anything to do with this. But I couldn't tell you who they were or anything.

Q. Now, had you ever been down to the Federal Building before this morning?

A. No, I haven't.

Q. During the last eight months at any court proceeding, [fol. 54] had you ever observed any of the defendants?

A. No, I haven't.

Q. When you returned to the bank on February 27th, 1964, how long did you stay at the bank?

A. Well, it must have been around six or 6:30 or possibly seven, I don't remember exactly.

Q. Six or 6:30, possibly seven.

A. I know it was after quitting time. I stayed around a little while.

Q. Were you interviewed by agents of the Federal Bureau of Investigation?

A. Yes, I was.

Q. Were you shown any pictures at that time?

A. I don't quite remember if I was shown pictures that day or not. I don't think I was.

Q. You don't think you saw any snapshots or anything?

A. I can't remember now whether it was that day or the day after when they were there.

Q. All right. Now, when you were shown pictures, where were you?

A. I was at the Ben Franklin Savings & Loan.

Q. And the Federal Bureau of Investigation came out?
[fol. 55] A. Yes, they did.

Q. Did all the members of the bank that were present on the 27th look at the pictures?

A. Yes, I believe they did.

Q. Were you together when you looked at the pictures?

A. No, we weren't.

Q. Where did you look at the pictures, in what room of the Federal Savings & Loan?

A. Well, we were right up front. There is a desk between—well, call it the lobby where people wait before they go to the teller. It was around in the afternoon. I think it was about noontime. We were the only three there.

Q. Were you the first person to look at the pictures at the bank, and the bank employees?

A. I don't think so.

Q. Others had looked before you, is that correct?

A. I think so. I was working and they told me to come down and look at some pictures.

Q. Now, will you describe the pictures. Were they snapshots, big photos, what type of pictures were they?

[fol. 56] A. They were snapshots, about four by six or whatever they are.

Q. How many pictures were shown to you at that time?

A. I think there were about five or six different pictures.

Q. Five or six pictures and all snapshots?

A. Yes. Excuse me, I am sorry. There was one picture that was larger, too. I remember now.

Q. Now, where have you lived most of your life?

A. Chicago, south side.

Q. Have you ever lived in any other part of the country?

A. Well, I spent two and a half years in Fort Benning, Georgia, in the Army.

Q. All right. How many people were in the bank at the time that you heard a man say, "I want a travelers' check"?

Mr. Dunne: Objection, your Honor. He identified the man as Simmons. That is what the posture of the evidence is.

The Court: Well, "heard someone," he may ask the [fol. 57] question in that fashion.

[fol. 63] Q. Now, at any time, were you ever asked by the City Police or the Federal Bureau of Investigation to view a lineup of possible suspects in this case?

A. No, I wasn't.

Q. How many times did you see those six pictures that you were given?

A. Just that one time.

Q. How many statements did you make to the Federal Bureau of Investigation?

A. I believe I just made that one to that man—I don't know what his name was.

Q. When did you make that statement?

I mean, in relation to the bank robbery, when did you make that statement?

A. Oh, it must have been a half hour or so, maybe 45 minutes after the incident happened.

[fol. 77] Q. Now, you mentioned that you were exhibited [fol. 78] certain pictures by the Federal Bureau of Investigation, six pictures; five snapshots and a larger picture?

A. Yes.

Q. Were any of these pictures—were any of the pictures there or more than one of the pictures of an individual man?

A. Yes, there were.

Q. How many pictures of one individual man were they out of the six?

A. Oh, I don't—I don't understand your first question. Maybe I answered wrong.

Q. Maybe I did not put it very well.

Were there six men depicted in these pictures, or were there five or four or three or two or one?

A. Well, a couple were with one man and some were with other men, three or four, I don't remember how many.

Q. So in two instances, there were two pictures of one man?

A. I don't remember. There might have been maybe just one, I don't—I am not sure.

[fol. 79] Q. Now, were there two pictures of the man you identified as being the man with the gun?

A. Yes. Yes, there were.

Q. Were there two pictures—were both of those snapshots?

A. Yes, those were snapshots, yes.

Q. Two snapshots of one man?

A. I believe that there were two; there might have been one, I cannot remember.

Q. Now, Mr. Mazaika—

Mr. Smith: Your Honor, I would request under 3500 that these—I would request these snapshots, they were part of the statement. I would like all six, I mean, I make the request for all six photographs from the Federal Bureau of Investigation or the Prosecutor's Office so that I can examine these and tell exactly what these pictures were.

Mr. Dunne: I object. Your Honor, I—well, I have no [fol. 80] objection, no particular objection, however, I don't think that they would qualify under 3500 statements as pictures.

The Court: Let me see the 3500 statement.

(The court examined the document.)

The Court: Well, I don't think that these qualify, either, under the 3500 statement.

Mr. Smith: Well, the only point is that this is the only man that—there was no lineup in this case; this is the only time that the man was shown any pictures, he is shown—

Mr. Dunne: The man saw them in open Court and identified them in open Court.

Mr. Smith: After he sees him in the Courtroom the same morning.

The Court: Well, gentlemen, you may argue this case later.

Well, the Prosecutor has made the statement that he has [fol. 81] no particular objection to it, and, although they may not technically qualify under 3500, I—

Mr. Dunne: Judge, I sent the special agent to get a special group of pictures; we may or may not be able to identify the pictures which we have, and there are a multitude of them, as to the precise pictures which were shown to Mr. Mazaika. But I am perfectly willing to have him have all of the pictures.

The Court: Proceed with the examination. We will determine this question later on.

Mr. Smith: All right.

The Court: We are not going to stop for this.

This is no part of the statement itself.

By Mr. Smith:

Q. Now, Mr. Mazaika, as I understand it, the other man, [fol. 82] not the man with the gun, because he was in a corner you did not really see him until they started to leave the bank, is that correct.

A. That is correct.

[fol. 92] The Court: Well, I am going to deny your request on the pictures because they are no part of this statement.

By Mr. Smith:

Q. As to the pictures, besides the pictures of the man that you say was the man with the gun, they showed you two of those, did you see any man, do you see any man in this courtroom now that was depicted in the pictures that they showed you?

A. Do you mean the pictures that they showed me is that man in the courtroom, is that what you mean?

Q. Besides the man with the gun, the one that you say was with the gun?

A. I could not tell from the pictures.

Q. Oh, you cannot tell anything from the pictures?

A. No.

Mr. Dunne: Objection, your Honor. He answered the question. There is no need for Mr. Smith to restate the answer.

[fol. 93] The Court: I will agree, the answers should not be restated.

[fol. 133] FLORENCE BABICK, called as a witness by the Government, having been first duly sworn, was examined and testified as follows:

[fol. 140] Cross examination.

By Mr. Smith:

[fol. 146] Q. Now, were you ever exhibited pictures of anyone after February 27, 1964?

A. Yes, sir.

Q. How many pictures were shown?

A. Oh, lots of them.

Q. Were they snapshot type pictures?

A. They were all kinds. They were snapshots and other kinds.

Q. Now, were there more than one picture shown of any individual man?

A. Yes, sir.

Q. Were there more pictures than one shown of the man you now identify as Simmons?

A. Yes, sir.

Q. How many pictures would you say approximately?
[fol. 147] A. Well, I would maybe say two or three other pictures.

Q. Two or three other pictures?

A. Yes.

Q. Two or three other pictures of Simmons?

A. I don't know.

Q. Now, were there more than one picture of any man that you didn't identify as being in the bank?

A. Well—

Q. Do you see what I mean? Do you understand the question?

A. If there were I am sure I would have recognized him if I saw more than one picture of—more than one picture of one man, but they would not be outstanding to me.

Q. No, what I am asking you is this: Except for Simmons, the one, the pictures of the man that you identified as Simmons, did any of these other individuals depicted in the pictures have more than one picture of them?

A. Well, there could have been.

Q. You do not know?

[fol. 148] A. Offhand, I don't, no, but I am sure that there could have been.

Q. Were there some individual pictures, only one picture of other individuals?

A. Yes, there were.

Mr. Smith: Your Honor, just for the record, I request those pictures again. I know that your Honor has overruled, yes.

The Court: Yes, you may request them again.

Mr. Smith: Pursuant to 3500.

The Court: That is right.

Miss Coonrod: If your Honor please, I would like to join in Mr. Smith's request, the request made by Mr. Smith both as to these pictures and as to the prior pictures.

The Court: I will assume that you are all joining in on these requests.

Motion denied.

[fol. 154] By Mr. Smith:

Q. Did you say—

A. But I would say five minutes.

[fol. 155] Q. Okay. Thank you.

Did you see which way the two men ran when they exited from the bank?

A. They ran north.

Q. Would you say—

Mr. Smith: Strike that.

By Mr. Smith:

Q. Were these three or so pictures that you saw of Simmons the snapshots—the snapshots, were they at different angles?

A. Yes, different angles, yes.

Q. Were there any pictures of Simmons larger than a snapshot?

A. I don't remember. I really don't remember. It has been a long time ago.

Q. All right. Now, when is the last time you read your statement that you gave to the Federal Bureau of Investigation?

A. (No response.)

Q. (Continuing) I show you what has been marked Government's Exhibit C for identification.

(Document handed to the witness.)

By the Witness:

A. I saw this this morning.

[fol. 181] ROBERT JAMES GARRETT, one of the defendants herein, called as a witness in his own behalf upon a motion to suppress, having been first duly sworn, was examined and testified as follows:

[fol. 182] Cross examination.

By Mr. Dunne:

[fol. 202] Q. And the contents of that suitcase, the [fol. 203] clothing, et cetera, was brought to you—was brought by you to Chicago in a suitcase similar to the one, Government's Group Exhibit No. 4 for identification, is that right?

A. Yes.

Mr. Dunne: I have no further questions.

The Court: You may step down.

Mr. Ginsberg: Could I ask some rebuttal questions?

The Court: Yes.

Redirect examination.

By Mr. Ginsberg:

Q. Mr. Garrett, did you consent to the removal of the suitcase from the home of Mrs. Andrews?

Mr. Dunne: I can't understand the question, Mr. Reporter. Will you repeat the question.

(Question read by the reporter.)

Mr. Dunne: Objection. I can't understand how that is relevant.

The Court: Why?

Mr. Dunne: I can't see how that is relevant—oh, I [fol. 204] will withdraw the objection.

The Court: He may answer.

By Mr. Ginsberg:

Q. Did you consent to that?

A. No, I did not.

Q. How long ago—when did I become your attorney?

Mr. Dunne: I don't understand question again.

Mr. Ginsberg: I asked when did I become Mr. Garrett's attorney.

Mr. Dunne: Oh, I will stipulate that Mr. Ginsberg was appointed January 11, 1965.

The Court: The record shows this.

Mr. Ginsberg: I have no further questions of this witness.

The Court: That is all.

[fol. 206] MARY ELLEN MAHON, called as a witness by the defendant Garrett on a motion to suppress, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ginsberg:

[fol. 209] Q. Did they ever tell you who they were?

A. No, they did not.

Q. Did they ever show you any kind of a warrant?

A. No, they did not.

Q. After their arrival, could you tell the Court what they did?

A. They searched my house.

Q. Did they go upstairs?

A. Yes.

Q. Did they go downstairs?

A. Yes.

Q. How long did they remain downstairs?

A. About ten minutes.

Q. And by "downstairs", you mean—

Mr. Ginsberg: I am referring to down in the basement when I say "downstairs".

By Mr. Ginsberg:

Q. Downstairs, is that what you mean?

A. Yes.

Q. How long did they remain in the basement?

A. About ten minutes.

Q. Then what did they do?

[fol. 210] A. They came back up and left, when I asked them to.

[fol. 212] Q. What did they do with the suitcase that I [fol. 213] showed you?

A. They took it with them.

Q. Did you say anything to them—

A. I asked them please not to take it, but they did.

Q. Did these two men do anything else while in your house?

A. Oh, they tore the house up and looked and searched everything.

Mr. Ginsberg: No further questions.

The Court: Cross examine.

Cross examination.

By Mr. Dunne:

Q. Mrs. Mahon, did they take two suitcases?

A. Yes.

Q. And is Government's Group Exhibit No. 4 the other suitcase, if you know?

A. They both was taken.

Q. Did you own those suitcases?

A. No, I didn't own them.

Q. Do you know who Government's Group Exhibit No. 3, this suitcase, belongs to (indicating)?

A. No.

[fol. 214] Q. No?

A. No.

Q. Did you ever see anybody bring that suitcase to your house?

A. (No response).

Q. Please answer yes or no.

A. No.

Q. He is taking it down on this little machine.

A. No.

Q. Did you ever see anybody bring Government's Group Exhibit No. 4 to your home?

A. That might be the suitcase. I would not say.

Q. Well, did you ever see anybody bring Government's Group Exhibit No. 4 to your home?

A. No.

Q. You never did?

A. No.

Q. All right. Then, do you know how these two suitcases got in your house?

A. No.

Q. Now, did you give anybody permission to put these two suitcases in your house?

A. No.

Q. Directing your attention to the counsel table here, [fol. 215] where defense counsel are seated, have you ever seen any of the men who are seated at that counsel table in your home on December 27, 1964?

A. No, I wouldn't know them again if I should see them.

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[fol. 223] DANIEL R. HUNTINGTON, called as a witness by the defendant Garrett upon a motion to suppress, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ginsberg:

Q. Who was with you at that time?

[fol. 224] A. Special Agent John Quinlan.

Q. Anyone else?

A. No.

Q. At that time—

Mr. Ginsberg: Strike that.

By Mr. Ginsberg:

Q. Do you recognize this suitcase?

A. I do.

Mr. Dunne: Referring to Government's Group Exhibit No. 4 for identification.

Mr. Ginsberg: Yes. Thank you.

By Mr. Ginsberg:

Q. What did you do with this suitcase on February 27, 1964, if anything?

A. (No response).

Q. Did you take this from the house?

A. Yes, we did.

Q. Did you open it?

A. We opened it in the house.

Q. Do you recall being told by Mrs. Mahon not to take the suitcase with you?

A. No.

Q. Did you have a warrant?

A. No.

[fol. 225] Q. Do you know, of your knowledge, if any other visitors, other than—I think that you said Mr. John—

A. Mr. John Quinlin.

Q. Did any other FBI Agents, or men acting under your authority, visit the house that day?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No.

Q. To clarify that last question, do you know any other Agents, or men acting under your supervision, acting under your instructions, who were at the house before the time that you were there?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No.

Q. And to your knowledge, there was no warrant issued that day for the removal of this suitcase from the house?

A. No.

Mr. Ginsberg: Thank you. I have no further questions.

The Court: Cross examine.

[fol. 226] Cross examination.

By Mr. Dunne:

[fol. 227] Q. That would be Elmer Mahon?

A. Elmer Mahon. Mr. Mahon and his father, Mr. [fol. 228] Mahon's father. This was in the livingroom.

Q. All right. Did you have a conversation in the livingroom with Mrs. Mahon?

A. That is correct.

Q. What, if anything, did you say to her and what, if anything, did she say to you?

A. We explained our purpose for being there, that there had been a robbery committed at the Ben Franklin Savings & Loan Association, and we had reason to believe that Earl

Andrews may have been a participant, and we asked general questions relative to Andrews' size, weight, what he looked like, asked if she had a photograph of him.

Q. What did she say?

A. She said that she did not.

Q. All right. After that, did you have a further conversation with her?

A. Yes, sir. After having been in there for quite some time, we asked her if we could look around, because of the possibility—because the possibility existed that Earl Andrews may be in the house at that moment.

Q. What did she say when you asked her if you could look around?

[fol. 229] A. She said that she didn't mind at all; in fact, she would help us look around.

Q. All right. At that time, did Agent Quinlan have occasion to say anything to her with respect to her rights?

A. Oh, yes, absolutely. We told her, right at the beginning, that she didn't have to let us in, that we were merely there to ask questions and we were trying to gain information about her son and the whereabouts of her son. Anything that we found, or if we found him in the house, of course, we wanted to talk to him; we would have to cross that bridge, of course, if we found him in there.

Q. Did she have occasion to consent to the search of her home?

A. Yes, she led the search.

Q. All right. Did she take you to the basement apartment of her home?

A. Yes, she did.

Q. Did you have occasion to, at that time, in her presence, open and examine Government's Group Exhibits 3 and 4?

A. Yes, sir, we did.

Q. Subsequent to that time, what did you do, if any [fol. 230] thing?

A. Well, we asked her if those were her suitcases and she said no. We said whose are they? She said, "I don't know."

"Do you mind if we open them up?"

She said, "No, go right ahead."

Q. Did you open the suitcases up?

A. Yes, we did, in her presence, and in the presence of the other two gentlemen.

Q. All right. After you opened the suitcases up, did you examine the contents?

A. Yes, sir, we did.

Q. What did you do after that?

A. Well, we pointed out to her that we found—as she could see—that there were money wrappers, there were little coin cards that the coins are in—no, with the name of Ben Franklin Savings & Loan Association on them. We said that this looked like it probably came from whoever committed this crime.

Q. What did she say?

A. She said she guessed that it did. And so then—

Q. Then what happened?

[fol. 231] A. Then we asked her could we take them, and she said "Yes, you can. They don't belong to me."

Q. And did you take them from the home?

A. Yes, sir.

Mr. Dunne: No further questions.

Mr. Ginsberg: I have just two more questions, Your Honor.

The Court: Yes.

Redirect examination.

By Mr. Ginsberg:

Q. What time did you learn that you were looking for a man named Earl Andrews?

A. Well, contemporaneous with the time that we entered the house, 5:15; this was only a half a block, you see, from where the automobile was found. So this is just instantaneously.

Q. I see. In other words, this is just a few minutes between the time that you were looking for a certain individual and the time that you went to that house?

A. Maybe a minute.

Q. Maybe a minute?

A. Yes. We were moving pretty fast.

[fol. 232] Q. Did you know that there was a suitcase there?

A. No, we had no idea.

Mr. Ginsberg: May I have a minute?

The Court: Yes.

(Brief interruption)

By Mr. Ginsberg:

Q. When you arrived at Mrs. Mahon's house and entered the house, could you discern if anyone had been there before, or on any investigation?

Mr. Dunne: I object to that.

The Court: Sustained.

Mr. Ginsberg: Let me rephrase the question.

The Court: All right.

By Mr. Ginsberg:

Q. To your knowledge, had any governmental authorities visited the house before you arrived?

Mr. Dunne: Objection; asked and answered.

The Court: He has already asked that. He said that he had no knowledge of anybody else being there.

Mr. Ginsberg: No further questions.

The Court: That is all.

(Witness excused)

[fol. 247] MARY BIALEK, recalled as a witness by the Government, having been previously duly sworn, resumed the stand and testified further as follows:

[fol. 248] Cross examination.

By Mr. Smith:

[fol. 251] Q. On that occasion, did they show you snapshots?

[fol. 252] A. Snapshots and pictures and other pictures.

Q. Full-length pictures?

A. Yes.

Q. The first time, did they show you snapshots?

A. The first time, do you mean?

Q. The first time that you saw them.

A. I believe so.

Q. You believe so.

A. Yes.

Q. Now, of those snapshots, were there more than one picture of a given man?

A. Yes.

Q. Were there, in fact, three pictures of one man?

A. Of one man—you mean, just three pictures?

Q. Three pictures of one man.

A. Three pictures of one man? Well, of that, I am not sure.

Q. Now, was the man, who they had more than one picture of, was that the man that you now identify as Simmons?

A. I identified Simmons from some pictures that I saw yesterday.

Q. More than one picture of Simmons?

[fol. 253] A. Yes.

Q. Now, after identifying the pictures the first time, did you discuss the case with the Federal Bureau of Investigation?

A. I discussed it several times with them.

Q. How many times would you say that you discussed it?

A. Approximately, I could not tell you.

Q. Well, was it more than three times?

A. This, I am sorry, I could not tell you.

Q. Well, you discussed it with them the day of the occurrence?

A. Yes, sir.

Q. You discussed it with them the next day?

A. I am sorry, I cannot tell you just what days.

Q. Well, you say that you discussed it with them when they showed you the snapshots?

A. Yes, sir.

Q. Did they take down what you said?

A. They took down, at the time of the holdup, yes.

Q. How about the time that they showed you the pictures?

A. That I identified the person?

[fol. 254] Q. Yes.

A. Yes.

Q. Did you discuss, at that time, what this man, that you are now identifying, had done at the time of the holdup?

A. I don't remember whether they asked me those questions or not.

Q. Well, at the time that you were shown pictures, did you ever discuss anything with them more than just the identification of the pictures?

A. I don't believe so.

[fol. 255] Q. Well, how about Miss Babick?

A. Miss Babick, yes.

Q. And you told her what you had seen?

A. Yes.

Q. Did you tell anyone else what you had seen, of the members of the bank, the employees?

A. I probably did.

Q. How about Mr. Mazaika?

A. Did I discuss it with him?

Q. Yes.

A. No, I don't believe I did.

Q. At the time that you viewed the pictures, the first time, the snapshots, how many snapshots did you view, altogether, would you say?

A. Approximately, oh, I would say, probably fifty or more.

Q. Fifty?

A. Or probably more.

Q. Fifty?

A. Yes.

Q. Did anyone, except the man you identified as Simmons, have more than one snapshot?

A. Would you rephrase that, please?

Q. Well, was any man depicted, in these pictures that [fol. 256] you viewed, depicted more than once, depicted in more than one picture, except Simmons?

A. This, I am not sure of.

Q. Approximately how long after that? Would that have been a week, within a week, a month, three months—
[fol. 257] A. Well, they came quite often with pictures to show us, to be sure that we identified the right person.

Q. Right. Did they show you more pictures of Simmons?

A. They showed us pictures of him, with others.

Q. Right. Did they show you additional pictures of Simmons than the three snapshots?

A. Yes.

Mr. Dunne: Objection, Your Honor. Her testimony was that she said that she saw—there is no testimony that she saw more than one. She said that she was uncertain about that. I will object to misstating the evidence.

The Court: I will sustain the objection as it is framed.

Mr. Smith: All right. I think that she has answered.

By Mr. Smith:

Q. Did they show you pictures of Simmons at a later time, pictures other than the pictures that they had shown you at the first day, or, on the first day?

[fol. 258] A. I am sorry, I cannot answer that.

Q. Did you see any pictures of Simmons, outside of the snapshots?

A. Yes.

Q. Did you see pictures, outside of snapshots, the first day that you looked at the pictures?

A. I believe I said that I did not remember, that I did not remember whether he brought only snapshots or other pictures at that time.

Q. All right. How many times did you view pictures—

A. Several times.

Q. Several times?

A. Yes.

Mr. Dunne: Objection, Your Honor; asked and answered.

The Court: Overruled.

By Mr. Smith:

Q. During these several occasions, were additional pictures of Simmons brought to you, other than you had seen before, the first or second time?

Mr. Dunne: Objection; asked and answered.

Mr. Smith: No, it has not been asked and answered.

[fol. 259] The Court: She may answer.

By the Witness:

A. How was that, now?

By Mr. Smith:

Q. After the first and second time, on the several occasions, did they bring pictures to you other than—of Simmons—other than they had shown you on the first or second occasion?

A. This, I believe, I answered before, sir. I said that I didn't remember whether those were the same pictures; but they did bring pictures of Simmons, and others besides.

Q. Did they ever bring you pictures of Garrett?

A. Yes.

Q. So Garrett was one of the others that they brought to you, is that right?

A. Yes. That is right.

Q. Did they ever bring you pictures of this man seated right over next to the lady (indicating)?

A. This, I could not tell you, because I did not know this man; and if they did bring me pictures, I didn't—I would not remember him.

Mr. Dunne: Let the record show that counsel is indicating [fol. 260] the defendant William Earl Andrews.

The Court: Yes.

[fol. 263] By Mr. Smith:

Q. (Continuing) Approximately how long, before today, was the last time you saw pictures of the defendants?

A. Yast year.

Q. Last year?

A. Yes.

Q. Well, I mean, in November or June or what?

A: Oh, I cannot say that.

Q. Were the pictures that they showed you, how were they dressed in those pictures, the man that you identified as Simmons?

[fol. 264] A. Dressed—in dress clothes.

Q. With a tie?

A. I am not sure.

Mr. Smith: Your Honor, with this witness, too, I request the pictures that she has testified to.

The Court: It will be unnecessary to keep making these motions.

Mr. Smith: All right.

The Court: I am not going to change my ruling.

[fol. 270] By Mr. Ginsberg:

Q. You did say that you were shown pictures of Mr. Garrett after the occurrence?

A. Yes.

Q. In your statement, you do not indicate anywhere that you recognized any of those pictures as being Mr. Garrett, is that correct?

A. I am not sure right now.

Mr. Ginsberg: May I show the statement?

[fol. 271] The Court: Yes.

(The witness' statement was shown to her)

By the Witness:

A. (Continuing) Yes; but it also does not say that I did not.

The Court: I didn't get that.

The Witness: I did not say I did not.

The Court: She has said nothing about it either way.

Is that right?

The Witness: No, not either way.

The Court: All right, that is all?

Mr. Ginsberg: That is all, yes. Thank you very much, Your Honor.

The Court: Yes.

Mr. Dunne: Thank you.

I won't take my one question, Judge.

The Court: All right.

Thank you, Mrs. Bialek.

(Witness excused)

Mr. Dunne: May I have the 3500 Statements back of Mrs. Bialek?

[fol. 272] (The counsel for defendants returned the Statements as requested above)

BERNICE PARLIAMAN, called as a witness by the Government, having been first duly sworn, was examined and testified as follows:

[fol. 284]

Cross examination.

By Mr. Smith:

[fol. 288] Q. And when was the first time that you viewed pictures?

A. I might have been later that day, or the next day.

Q. Were you shown snapshots?

A. Yes.

Q. Were you shown snapshots which you identified as a man named Simmons?

A. Is Simmons the first gentleman?

Q. Well, did you identify the first man that you saw, as being one of the men—

A. I identified one photo that I thought, at that time, resembled him the most.

Q. The other photos didn't resemble him the most?

A. As far as I could see, no.

Q. And you were shown more than one photograph of the man you now say is Mr. Simmons, isn't that right?

A. Yes.

Q. The other two photographs didn't resemble him, the man who was in the bank?

[fol. 289] A. It didn't appear to me as if he was the one. May I state why?

Q. Well, Mr. Dunne will certainly ask that question, on cross examination.

When is the next time that you viewed pictures?

A. Oh, within a period of maybe two, three days later. We were shown pictures, I would say, at an interval of a week.

Q. The next time was about a week later?

A. Well, about a week.

Q. Right. And did you see any other—more pictures of Simmons, at that time?

A. Yes.

Q. Other than the ones that you had been shown the first day?

A. No.

Q. Were you shown more than one photograph of Simmons at that time?

A. Yes.

Q. Could you tell us what the conversation was at that time—in other words, the first time that you had identified it, and you thought one resembled and two did not.

[fol. 290] Now, you were shown the same pictures a week later, is that correct?

A. It was—yes, yes, it was.

Q. Were you told any more about the background of these men by the Federal Bureau of Investigation?

A. No, sir.

Q. Were you told anything more about what their investigation had revealed?

A. No, sir.

Q. Had you heard anything from any of the bank employees about a white Thunderbird?

A. Would you phrase that—I am sorry. Will you say that again?

Q. Had you found—had you heard anything from the other employees that the bank robbers were supposed to have a white Thunderbird?

A. Yes.

Q. Did you know that Simmons or Garrett, at the time that you viewed the pictures the second time, or the first time, were supposed to have been associated with a white Thunderbird?

Mr. Dunne: I think I will object to that, Your Honor.

The Court: Well, had anyone told you that?

[fol. 291] By Mr. Smith:

Q. Right. You knew what they had seen in the bank [fol. 292] robbery, and they knew what you had seen, is that right?

A. I imagine so.

Mr. Dunne: Objection.

The Court: I will sustain the objection to that question.

By Mr. Smith:

Q. On any of the—

Mr. Smith: Strike that.

By Mr. Smith:

Q. You testified that you saw the pictures, either the same day or the next day, and then about within the interval of a week. Did you, at any other time, see the pictures?

A. Before the case, before this case?

Q. Yes.

A. Yes.

Q. Where did you see them?

A. When I was subpoenaed.

Q. And when you came down to the office of the United States Attorney?

A. No, they came to my home.

Q. And they showed you—they showed you how many pictures at that time?

[fol. 293] A. Oh, I would say about four or five, maybe six.

Q. And three of them were of—

A. Do you mean of the one gentleman, or altogether? There were two gentlemen involved.

Q. Right. And they showed you altogether how many pictures?

A. Oh, I would say about seven.

Q. And all of the pictures were of either of the two gentlemen, either Mr. Garrett or Mr. Simmons—either of Mr. Garrett or Mr. Andrews?

A. Yes, sir.

Q. No other pictures were shown to you at that time?

A. No, sir.

Q. Did you have a discussion about the case at that time, when they came out to your home?

A. Just to make sure that the report that they had a year ago was correct, was as correct as I could remember it.

Q. Right. Did they take notes at that time of what you were saying?

A. No, sir.

Q. At the time that you first viewed pictures, either the [fol. 294] same day, or the day after, was any man in more than one picture, except the man named Simmons?

A. Do you mean, was he in a group photo?

Q. No. I am sorry.

A. I am sorry. I didn't understand.

Q. Simmons—they showed you three pictures of Simmons—

A. Now, are you speaking of right after the robbery, or are you speaking—

Q. Let's take the day after, the first day, or the same day, after the robbery. They showed you three pictures of Simmons?

A. I cannot remember just exactly how many they showed me that day, but there were more than—there were probably three or four.

Q. Of Simmons?

A. Well, I imagine so, it was Simmons.

Q. Outside of Simmons, did they show you more than one photograph of any other man?

A. Oh, yes.

Q. And was that Garrett?

A. Well, there was—I am not sure, at that time, whether there was any of Garrett.

.

[fol. 351] (Addressing the witness:) You may step down.

(Witness excused.)

(Whereupon the jury was excused, until the following day, after which the following further proceedings were had herein, in open Court, outside the presence and the hearing of the jury, as follows:)

The Court: All right.

Mr. Dunne: Your Honor, while all counsel and the defendants are here, I will ask, or perhaps Mr. Ginsberg, this is not the place, but I would ask Mr. Ginsberg if he would consider stipulating that the clothing which was in this suitcase which has been identified by your client as being the clothing identified by Mr. Garrett as being his clothing, then the—otherwise, I will have to call the court reporter to testify to that. He was present in court. He was present in court when Mr. Garrett testified under oath and that transcript, of course, would be admissible. It does not make any difference to me, it is just a question of—just so [fol. 352] that I can alert the court reporter and order the transcript. I have no feeling on it one way or the other.

I don't mean to press Mr. Ginsberg, I would just like to know now.

The Court: Why don't you let him think about it.

Mr. Dunne: Sure. I will order the transcript anyway.

The Court: You had better order the transcript.

Mr. Dunne: I would also like to inform the defense that I will probably have, depending upon the cross examination, that we will have only two or three more witnesses, probably only two.

The Court: We ought to finish tomorrow morning.

Mr. Dunne: Yes.

The Court: That is, finish the Government's case.

Mr. Dunne: That is right, finish the Government's case.

The Court: All right.

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[fol. 356] You may proceed, Mr. Smith.

Mr. Smith: Thank you, your Honor.

BERNADINE DZIEDZIC, called as a witness on behalf of the Government, having been previously duly sworn, resumed the stand and testified further as follows:

Cross examination.

By Mr. Smith:

Q. After the bank robbery, were you shown pictures of [fol. 357] men?

A. Yes.

Q. When were you shown those pictures?

A. A day after the robbery and about three weeks later, three or four weeks later.

Q. How many pictures were you shown the first day after the robbery?

A. About five or six.

Q. Were any of those, did you identify any of those pictures as the man Simmons?

A. As the man Simmons, yes.

Q. Now, how many pictures of those five or six were of Simmons?

A. That I can recall? About two or three.

Q. I show you this gentleman.

Mr. Smith: For the record, it is Mr. Andrews next to Miss Coonrod.

By Mr. Smith:

Q. Did you see any pictures of him after the bank robbery?

A. I don't remember.

Q. Outside of Mr. Simmons in these six pictures, was any man in more than one picture?

[fol. 358] A. Of the two that you are speaking of or different men?

Q. No.

A. I don't understand.

Q. You were shown six pictures the day after the robbery, five or six pictures?

A. Yes.

Q. Two or three of them were of Mr. Simmons, is that right?

A. Yes.

Q. Is that right?

A. Yes.

Q. Now, the remaining three or four pictures, was one man in more than one of those three or four pictures?

A. Yes.

Q. How many men were altogether depicted in those five or six pictures?

A. I couldn't tell you how many; there were several. That is all I could say.

Q. Well, there were five or six pictures. Two or three of them were—

Mr. Dunne: Objection, your Honor. She answered the question.

[fol. 359] The Court: Well, the evidence is in the record. Now, what is your next question.

Mr. Smith: All right.

By Mr. Smith:

Q. About three weeks later, you saw pictures again, is that right?

A. Yes.

Q. Did you see the same two or three pictures of Simmons?

A. No, there were several other pictures, too.

Q. More pictures of Simmons?

Mr. Dunne: Objection, your Honor.

The Court: Well, just a moment. That is a question, I take it?

Mr. Smith: And you said yes?

Mr. Dunne: No, your Honor. She said there were several other pictures, too.

The Court: Just a moment. Counsel is entitled to examine her.

State your question so the witness understands the question.

Mr. Smith: Yes, I will.

By Mr. Smith:

[fol. 360] Q. Were there more than two or three pictures of Simmons at that time?

A. This is the second time that I saw the pictures?

Q. The second time, that is right.

A. I couldn't be certain of that.

Q. Well, did you say a moment ago that there were more than two or three pictures of Simmons?

Mr. Dunne: Objection, your Honor.

The Court: I will sustain the objection. What she said is in the record.

By Mr. Smith:

Q. Did you see any pictures other than those two times?

A. No.

Q. You didn't see—did Mr. Dunne ever come to you and ask you about this case, to your house and ask you about this case?

A. He didn't come to my house.

Q. Did he come to the bank?

A. Yes, to the bank.

Q. Did he show you pictures at that time?

A. Yes, he did.

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[fol. 437] JOHN P. QUINLAN, called as a witness on behalf of the Government, and having been previously duly sworn, resumed the stand and testified further as follows:

[fol. 442] Cross examination.

By Mr. Smith:

Q. Agent Quinlan, did you obtain some snapshots from Pat Jones?

A. Yes, sir, I did.

Q. How many snapshots did you obtain?

A. Now, sir, you say I personally. It was on the following day on the 28th of February, we went there at about 9:00 in the morning and there were about five of us. She went through her scrapbook and came up with three or four pictures some of which maybe she gave me one, another agent one, and they were all collectively given to the man that was running that phase of the investigation, the other agent.

Q. The three or four pictures, who were they of?

A. Sir, they were of her brother Earl Andrews, one I know was in a jacket and a hat. I believe a second one was of Earl Andrews, too.

Q. Were there some pictures of Simmons, too?

A. I don't know. There may have been, I don't know.

[fol. 443] Q. But you think that you and the group that was there obtained four or five pictures?

A. Yes, sir.

Q. And you didn't see all the pictures, is that right?

A. Yes, sir. That is an accurate statement. I didn't see them all.

[fol. 670] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 671]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 15223-24-25

SEPTEMBER TERM, 1966 SEPTEMBER SESSION, 1966

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ROBERT JAMES GARRETT, THOMAS EARL SIMMONS and
WILLIAM EARL ANDREWS, Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

OPINION—DECEMBER 7, 1966

Before HASTINGS, *Chief Judge*, DUFFY, *Senior Circuit Judge*, and SCHNACKENBERG, *Circuit Judge*.

SCHNACKENBERG, *Circuit Judge*. Defendants, Robert James Garrett, William Earl Andrews and Thomas Earl Simmons, severally appeal from judgments entered by the district court, on April 6, 1965, based upon a trial by jury, convicting them of robbery on February 27, 1964 of a savings and loan association whose accounts were insured by the Federal Savings and Loan Insurance Corporation, in violation of Title 18 U.S.C. § 2113, said defendants then being armed with dangerous weapons, to-wit, firearms, as charged in an indictment filed March 3, 1964.

[fol. 672] It appeared from evidence introduced out of the jury's presence on defendant Garrett's motion to suppress that during the afternoon of February 27, 1964, six men forced their way into the home of Mrs. Mahon, the mother

of defendant Andrews, and after ransacking the house without permission, they suddenly left without taking anything. Thereafter, at about 6:30 P.M. FBI agents Huntington and Quinlan came to that house without a warrant and went to the basement where they saw two suitcases in which money wrappers and other incriminating evidence were found. The men took one of the suitcases with them. While they were in the house they "looked and searched everything". On cross-examination Mrs. Mahon testified that the men took both suitcases, which were not owned by her, and in fact she did not know how they got there, because she did not give anybody permission to put them there.

Mrs. Mahon further testified that, when these agents said there was something in the basement that they wanted, she did not know that a suitcase was there, so they went down and she followed. She testified that she did not on that day give anybody permission to put the suitcases in her house, specifically a brownish suitcase (Government's Group Exhibit No. 4). Her answer was the same as to another suitcase marked Government Group Exhibit No. 3.

She also testified that Andrews was not in her home that day.

At the hearing on said motion, Garrett testified in substance that a suitcase (the one marked Government's Group Exhibit No. 4) *belonging to him* was removed from the home of Mrs. Mahon on February 27, 1964 and that he (Garrett) did not consent to said removal.

1. Garrett charges that the district court thereafter erred in admitting *in the presence of the jury* a reading by the court reporter of the testimony of Garrett in support of his motion for suppression of the evidence seized without a warrant.

In the course of his reasoning Garrett's counsel urges upon us that

[fol. 673] "To protect his Fourth Amendment rights against unreasonable search and seizure, defendant [Garrett] was obliged to take the stand and assert

ownership in one of the suitcases seized by the F.B.I. agents without a warrant. In order that the defendant Garrett have the proper standing to make the objection, it was essential that he so testify. Over objection, however, the trial court allowed the transcript of Garrett's testimony in support of his motion to be read to the jury, and thus the fatal link identifying him with the suitcase and its contents was established. To thus force the defendant Garrett to barter away his rights against self-incrimination in return for the opportunity to assert his Fourth Amendment rights is a violation not only of the right against self-incrimination, but of the right to due process itself."

His counsel contends that, in deciding to testify for the purpose of establishing Garrett's ownership of the suitcase, at the risk of having that testimony used against him upon the issue of guilt, he was required to and did resolve a dilemma. However, counsel has shown no dilemma, because he never has shown that there was no other way for him to prove Garrett's ownership of the suitcase. It is a matter of common knowledge that the fact of ownership of such an object as a suitcase might be proved in numerous ways, viz: testimony or documentary evidence of a purchase thereof by the alleged owner, open possession and the use thereof by him or other circumstances so commonplace as to be unnecessary to enumerate. Moreover, the choice of a solution for a dilemma (if we assume that one existed) was for Garrett's attorney, and he made a decision. He was confronted with an indictment charging Garrett with a criminal offense. Even if there were no other evidence of ownership available, Garrett voluntarily testified in support of his motion to suppress and he could not thereafter rely on the fifth amendment to bar consideration by the trier of facts of that testimony, if relevant (which it was), in the trial of the criminal charge against him.

Faced with an indictment charging him with a criminal offense, defendant Garrett was entitled to, and had, a trial

by jury.. But, although defense counsel had the usual prob-[fol. 674] lem of whether to call defendant as a witness to prove ownership on the motion to suppress, it does not follow from the fact that defendant did testify that what he then said was improperly submitted to the trial jury on the issue of his alleged guilt. It was certainly relevant. The testimony was voluntary and given under the guidance of his own counsel. To hold otherwise, we would in effect be attempting to create a "judicial amendment" to the constitution to protect persons from the risks of errors of judgment in trial tactics. That is neither our office nor our inclination. We hold that no error occurred in the district court in respect to this matter.

To the same effect is the result reached in *Heller v. United States*, 7 Cir., 57 F. 2d 627 (1932), at 629, cert. denied 286 U.S. 567.

Our decision is not contrary to the holding in *Green v. United States*, 355 U.S. 184 (1957), cited by defendant.

2. Defendant Garrett contends that his suitcase was "improperly introduced in evidence because (a) the suitcase had not been 'abandoned' by the defendant, (b) it was seized by F.B.I. agents without a warrant, and (c) it was seized without the defendant's permission."

We believe that the evidence shows that Mrs. Mahon, in whose basement the suitcase was found, was in possession of Garrett's suitcases and that she consented impliedly to their search and seizure. *Cutting v. United States*, 9 Cir., 169 F. 2d 951, 952 (1948); *United States v. Walker*, 2 Cir., 197 F. 2d 287, 289 (1952), cert. denied 344 U.S. 877. Agent Huntington testified that "she led the search".

In *Marshall v. United States*, 9 Cir., 352 F. 2d 1013, 1014 (1965), cert. denied 382 U.S. 1010, F.B.I. agents obtained the possession of a brief case of defendant left in the possession of his landlady for safekeeping. The court said, at 1015:

"None of this, however, is meant to mean that a man's briefcase is never secure against unreasonable search

and seizure, but when *possession and control of his briefcase is given by a man to another person we think that man accepts the risk that the other person will* [fol. 675] *consent to a search and seizure of it and, under the circumstances that exist in this case, such consent is valid.* * * * (Emphasis supplied.)

While counsel for Garrett cites *United States v. Jeffers*, 342 U.S. 48 (1951), we hold that *Jeffers* is distinguishable because it involved the entry of a hotel room of the aunts of defendant therein by officers while the tenants were absent from the premises. In the case at bar a private home was searched while the homeowner was present, gave permission and led the search.

3. Counsel for defendant William Earl Andrews, a son of Mrs. Mahon, in this court emphasizes that the government, in attempting to prove the identity of the robbers of the loan association, produced an employee thereof who saw two men leave after the robbery in a 1960 Thunderbird, which was identified as belonging to a sister of defendant Andrews.

The government evidence against Andrews was that he borrowed his sister's Thunderbird about 11:30 A.M. on the day of the robbery and returned it about 2:30 P.M. of the same day, that a similar car was seen outside the scene of the crime by a teller who ran out after the two robbers. The latter witness testified he saw only two men in the car and that one of them was defendant Simmons. Other eyewitnesses saw the second robber while inside the Association and later identified him as defendant Garrett.

We find there is on the record no sufficient evidence to justify conviction of defendant Andrews as an aider and abettor of the alleged robbery.

4. Defendant Simmons, testifying in his own behalf, denied that he was at the Association on February 27, 1964. Five Association employees who saw the men who conducted the holdup pointed out defendant Simmons in the court-

room. It is the contention of defense counsel that all of these witnesses, when identifying Simmons, were able to do so only because they had viewed certain snapshots of him which were in the hands of F.B.I. agents. It is further urged that the snapshots were shown to the witnesses in such manner that Simmons dominated those shown in the group of pictures viewed by these witnesses. However, [fol. 676] these government witnesses underwent a cross-examination by defense counsel and we believed the record reveals that the weight to be given the identification testimony of the government witnesses was properly entrusted to the jury. Certainly we are not convinced, in view of the jury's verdict, that the record shows without question that the Association employees were improperly led to identify Simmons as one of the robbers by the showing of these snapshots to the government witnesses who identified Simmons.

Counsel for Simmons also contends that the Jencks Act required the prosecutor to tender to the defense "the pictures along with the statements".

As we said in *United States v. Sopher*, 362 F. 2d 523 (1966), cert. denied November 7, 1966, 35 LW 3162, 18 U.S.C.A. § 3500 (e) applies to a written statement made by a witness and signed or otherwise adopted or approved by him, or a recording or transcription thereof.

There is nothing in the Jencks Act which includes a photograph which is not a part of a statement as there defined. To the same effect is *Ahlstedt v. United States*, 5 Cir., 325 F. 2d 257, 259 (1963), cert. denied 377 U.S. 968.

5. A few remaining points raised in briefs of defendants we find lack merit.

As to defendant Andrews, the judgment from which he appealed is reversed.

As to the remaining defendants who have appealed, the judgments of the district court are affirmed.

Affirmed in Part and Reversed in Part.

[fol. 677]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. John S. Hastings, Chief Judge; Hon. F. Ryan Duffy, Senior Circuit Judge; Hon. Elmer J. Schnackenberg, Circuit Judge.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

ROBERT JAMES GARRETT, THOMAS EARL SIMMONS and
WILLIAM EARL ANDREWS, Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JUDGMENT—December 7, 1966

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court as to defendant Andrews, in this cause appealed from be, and the same is hereby, Reversed, and the judgments of the District Court as to the remaining defendants, Garrett and Simmons, be, and the same are hereby Affirmed, in accordance with the opinion of this Court filed this day.

[fol. 678]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before: Hon. John S. Hastings, Chief Judge; Hon. F.
Ryan Duffy, Senior Circuit Judge; Hon. Elmer J.
Schnackenberg, Circuit Judge.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ROBERT JAMES GARRETT, et al., Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.

ORDER DENYING PETITION FOR REHEARING—January 23, 1967

It Is Ordered by the Court that the petition for rehear-
ing filed in this cause by the defendants-appellants herein
be, and the same is hereby Denied.

[fol. 679] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 680]

SUPREME COURT OF THE UNITED STATES

No. 1087—October Term, 1966

THOMAS EARL SIMMONS, et al., Petitioners,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI—June 12, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted; and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

